Supreme Court, U.S.
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No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

CLIFFORD ALEXANDER, ET AL.,

Appellants,

v.

WILLIAM M. DALEY, ET AL.,

Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Is Article I, § 2, of the Constitution properly construed to divest U.S. citizens resident in the nation's capital of voting representation in the House of Representatives, and can such an interpretation be harmonized with subsequent amendments to the Constitution and this Court's decisions establishing the right to vote as the central attribute of national citizenship?

PARTIES TO THE PROCEEDING

Appellants are fifty-four U.S. citizens resident in the District of Columbia—Clifford Alexander, Clinton Allen, Mary Ellen Arnold, Percy Battle, Wesley Brown, Andrew Bryant, Bonnie Cain, William Calbert, Oswald Cameron, Richard Carr, Dwight Cropp, Edward Eckenhoff, George Gibbs, Sr., A. Janelle Goetcheus, Michele Hagans, John Hechinger, Dorothy Height, Jehu Hunter, O.V. Johnson, Brenda Jones, Richard Jones, Kenneth Katz, Joan Kennan, Marguerite Kelly, Patricia King, Joyce A. Ladner, Debra L. Lee, Robert Low, Anna Marsh, David McDonald, Richard Moe, Luci Murphy, Brenda S. Nixon, Vincent E. Reed, Brenda Lee Richardson, Clyde Richardson, Don E. Robinson, Albert J. Schmidt, Kathryn J. Schmidt, Betty Smalls, Lloyd D. Smith, Miles S. Steele, III, Henry Strong, H. Patrick Swygert, Hector Torres, Stephen Joel Trachtenberg, Walter Washington, Frank H.F. White, Roger Wilkins, Eddie N. Williams, Ray Wilson, Joseph Wood, Willie V. Wood, and Elizabeth Yancey—and the District of Columbia, on behalf of itself and the approximately 500,000 citizens of the District of Columbia not individually represented. All appellants were plaintiffs below.

Appellees, defendants below, are: William M. Daley, as Secretary of Commerce; Jeff Trandahl, as Clerk of the United States House of Representatives; Wilson Livingood, as Sergeant-at-Arms of the U.S. House of Representatives; Gary Sisco, as Secretary of the United States Senate; and Gregory S. Casey, as Senate Sergeant-at-Arms and Doorkeeper of the U.S. Senate.

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JURISDICTIONAL STATEMENT

Our Declaration of Independence proclaims that governments "deriv[e] their just Powers from the consent of the Governed" and therefore that the "Right of Representation in the Legislature" is "a right inestimable" to the United States of America and one "formidable to tyrants only." Decl. of Independence, para. 2. Reflecting the primacy of these principles, the very first Article of the Constitution that cemented the union of "We, the People of the United States" promised a House of Representatives that would be elected for and by "the People of the several States." Art. I, § 2[1].

Nearly two centuries later, Article I's right to vote for congressional representation was established as the bedrock principle of our Constitution. No paraphrase can do justice to this Court's monumental holding in *Wesberry v. Sanders* that that provision must be interpreted to mean "one person, one vote" because "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." 376 U.S. 1, 17 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Id.*

As a result of this Court's and this country's commitment to the principles enunciated in *Wesberry*, almost every barrier to the Constitution's promise of universal suffrage has now been removed, with one conspicuous and indefensible exception. The 500,000 people of the United States who happen to reside in the nation's capital are denied voting representation in the Congress, and have been since 1801, when Congress accepted the cession of land for the District of Columbia from the State of Maryland and Commonwealth of Virginia. This denial of the franchise is more injurious for these citizens than it would be for any other group of Americans, because Congress not only is their

national legislature but, by virtue of Article I, § 8[17], is their ultimate local legislature as well.

Two years ago, fifty-four individuals residing in the District of Columbia, as well as the District of Columbia itself, brought this suit before a three-judge district court seeking to establish and vindicate the rights of citizens of the District of Columbia to be represented in Congress under Article I, § 2, and the guarantees of the Fifth and Fourteenth Amendments. A two-judge majority, over the dissent of their colleague, acknowledged the "justice of plaintiffs' cause" but held that "longstanding judicial precedent, as well as the Constitution's text and history" left it without authority to grant any relief.

Appellants submit this jurisdictional statement to demonstrate that this appeal from the decision of the three-judge court presents a substantial question affecting a fundamental right of over half a million District residents. The question presented calls for this Court's plenary consideration, including, if necessary, a re-consideration or clarification of those cases that the district court believed barred it from recognizing the right of citizens of the District of Columbia to participate fully in the democratic processes established by our Constitution.

OPINIONS BELOW

The majority and dissenting opinions of the three-judge Court are reported at 90 F. Supp. 2d 35 and are reprinted in the accompanying Appendix ("App.") at 1a and 74a.

JURISDICTION

The three-judge district court issued its Memorandum Opinion and Order on March 20, 2000. The opinion rendered a final judgment denying appellants' claims that the failure to apportion members of the House of Representatives to the District of Columbia violated their constitutional rights. A notice of appeal to this Court from the decision of the three-

judge court was filed in the District Court and served on all parties on May 18, 2000. App. 167a. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the Constitution provides in relevant part:

> Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .
>
> . . . .
>
> Section 8. The Congress shall have Power . . . [17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . .

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment to the Constitution provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. § 2284 provides in relevant part:

(a) A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

STATEMENT OF THE CASE

On September 14, 1998, appellants filed a complaint in the U.S. District Court for the District of Columbia challenging the constitutionality of their exclusion and that of over a half million residents of the District of Columbia from congressional elections. App. 172a. The complaint alleged that the residents of the District possess a constitutional right to vote in congressional elections that is protected both by Article I and by subsequent constitutional amendments that guarantee to every American the equal protection of the laws, due process of law, the privileges and immunities of national citizenship, and a republican form of government. Based on these constitutional provisions, appellants alleged that the defendants—the Secretary of Commerce and certain House and Senate officials—had unlawfully excluded the District and its residents from the apportionment of congressional districts and from participating in the election of Members of Congress.

Because the action challenged the constitutionality of the exclusion of District of Columbia residents from the process of apportioning seats in the House of Representatives, appellants applied for a three-judge court under 28 U.S.C.

§ 2284. On November 6, 1998, the district court issued a memorandum opinion requesting appointment of a three-judge court. App. 157a.[1]

Shortly thereafter, appellants moved for summary judgment and asked the district court to declare the constitutional right of U.S. citizens residing in the nation's capital to participate in congressional elections, to order the defendant Secretary of Commerce and the defendant officers of the House of Representatives to account for District citizens in the apportionment of seats in the House of Representatives, and to defer further action for a reasonable period of time to give Congress the first opportunity to choose among the potential remedies. Secretary Daley and the House and Senate Defendants separately opposed the motion and filed motions to dismiss.

On March 20, 2000, the divided court issued a decision dismissing appellants' claims that they had been unconstitutionally excluded from the congressional apportionment process for the House of Representatives.[2] Before addressing the merits, the three-judge court unanimously rejected the defendants' contention that the

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[1] The case was consolidated with *Adams v. Clinton*, No. 98-1665, on November 3, 1998.

[2] All other claims, including appellants' claim to a right to participate in the election of members of the Senate, were remanded to the single-judge court because they fell "outside the jurisdictional mandate of section 2284(a)" and the three-judge court declined to exercise supplemental jurisdiction over them. App. 4a-5a. The single-judge court issued a separate opinion declining to reach the Senate claims on the ground that plaintiffs lacked standing, App. 143a, and that decision has been separately appealed to the U.S. Court of Appeals for the D.C. Circuit. The only issue appealed to this Court involves the holding of the three-judge court that appellants do not have a right to voting representation in the House of Representatives.

complaint raised a nonjusticiable political question, holding that the issue was a purely legal one which "the courts are perfectly capable of resolving," and noting this Court's repeated declarations that " 'constitutional challenges to apportionment are justiciable.' " App. 7a, *quoting Franklin v. Massachusetts*, 505 U.S. 788, 801 & n.2 (1992) (plurality opinion of O'Connor, J.) (citing *Department of Commerce v. Montana*, 503 U.S. 442 (1992)); accord *Wesberry*, 376 U.S. at 6.

The court also unanimously concluded that appellants had standing to press their suit. The court held that appellants' lack of representation in the House was an "injury in fact" and that (if appellants were correct that the Constitution entitled them to vote for House representation) the defendants' failure to include District residents in the congressional apportionment was the cause of that injury. App. 8a-10a. The district court also held that the injury was redressable because a "judgment directing the Secretary of Commerce to report the population of the states in a specified way would directly affect the apportionment of the House, either because the President would voluntarily abide by it or because the President had no choice but to abide by it." App. 13a; *see Franklin*, 505 U.S. at 802-03 (opinion of O'Connor, J.); *id.* at 808-17 (opinion of Stevens, J.). In reaching this conclusion, the court noted that "[h]ere, as in *Franklin*, neither the President nor the House officials have suggested that they would refuse to follow a decision of this Court . . . regarding the apportionment of congressional districts." App. 14a.

On the merits, two members of the district court interpreted Article I, § 2, to exclude U.S. citizens living in the District of Columbia from counting as "People of the several States" for purposes of the apportionment of congressional representatives. App. 25a. The majority concluded that its interpretation of the constitutional text was supported by available historical evidence and by language from this Court of very early vintage which the majority believed endorsed the view that residents of the District of Columbia did not have a

right to representation in Congress. App. 38a. Specifically, the majority cited language from *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805), which concluded that the District was not a "State" for purposes of federal court Article III jurisdiction, and *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820), which determined that the federal government had the power to tax District residents despite their lack of representation in Congress, a holding that was later repeated in *Heald v. District of Columbia*, 259 U.S. 114 (1922).

In response to appellants' argument that this Court has subsequently treated residents of the District as residents of a "State" for other constitutional purposes and that application of *Wesberry* and other voting rights cases called for the same result here, the two-judge majority stated that "[i]t is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since." App. 38a, *quoting Breakefield v. District of Columbia*, 442 F.2d 1227, 1229-30 (D.C. Cir. 1970).

The majority also held that residents of the District did not enjoy a "residual" citizenship in the State of Maryland that would permit them to participate in Maryland's congressional elections. The majority relied in large part on this Court's decision in *Albaugh v. Tawes*, 379 U.S. 27 (1964), which summarily affirmed a decision barring District residents from voting in Maryland's elections for the United States Senate. App. 56a. The majority acknowledged a "tension" between the *Albaugh* decision and *Evans v. Cornman*, 398 U.S. 419 (1970), which struck down as unconstitutional a Maryland requirement preventing persons living on the grounds of the National Institute of Health, a federal enclave, from voting in state and federal elections. Nonetheless, the majority held, "[w]e must apply the law as it now stands and, until the Supreme Court instructs otherwise, that law is set forth in *Albaugh*." App. 57a.

Having concluded that the original interpretation of Article I, however oblique, was to deprive residents of the

nation's capital from voting representation in the House of Representatives, the majority refused to consider whether that interpretation should still hold in light of later amendments to the Constitution further confirming and establishing the right to vote through the guarantees of equal protection, due process, and the privileges and immunities of national citizenship.

Judge Oberdorfer dissented. While recognizing that "ever since 1801, it has been assumed by some, but never authoritatively decided, that District inhabitants have no right to apportionment and to vote for voting representation in the House of Representatives," he believed that, in light of the centrality of the asserted right, "it behooves the judiciary to test thoroughly any purported necessity for such a practice and the assumptions underlying it." App. 76a, 77a. He then parsed the language from this Court's early cases relied upon by the majority and decided that those precedents did not "necessitate a conclusion that by using the word 'States' in Article I or in drafting any other provisions of the Constitution in 1787 the Framers intended to deny to the inhabitants of the yet-to-be-selected Seat of Government the right to vote for voting representation in the House of Representatives." App. 118a; *see also id.* at 120a. Had that been the framers' intent, he reasoned, they surely would have said so explicitly. *Id.*

Rather, Judge Oberdorfer explained, at the time the Constitution was written, all U.S. citizens lived in States, and Article I's reference to "the people of the several States" was therefore the most practical means available of assuring that *all* citizens would be represented. App. 108a (citing *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 803 (1995)). He observed that construing the word "States" as intentionally excluding citizens from voting representation once the national capital was created would serve "no policy purpose" at all. App. 107a. And he concluded that any doubt whether the framers intended to deny residents of the capital voting representation should be resolved by looking to the "fundamental democratic principles upon which this Nation

was founded." App. 120a (citing *Powell v. McCormack*, 395 U.S. 486, 547 (1969); *U.S. Term Limits*, 514 U.S. at 819-23). The dissent therefore concluded that Article I should be construed to give the residents of the District of Columbia a constitutional right to voting representation in the House of Representatives. "There is no dispute that voting by the people and the existence of a representative democracy are inextricably linked. One simply cannot exist without the other." App. 122a.

The dissent also found that the defendants had not offered any compelling governmental interest that would justify depriving the citizens of the District of the right to congressional representation. Among other things, Judge Oberdorfer noted that U.S. citizens living in federal enclaves and those living overseas are entitled to vote for Members of Congress, even though none is the resident of a "State" in the ordinary sense of the term. App. 134a-138a. He therefore concluded that denying citizens living in the nation's capital the right to voting representation on the ground that they were not residents of a "State" was also a denial of equal protection. App. 139a.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question whether United States citizens residing in the nation's capital can justly continue to be deprived of any voting representation in Congress is of the highest order. Even the majority below stated that "plaintiffs' grievances are serious" and that it was "not blind to the inequity of the situation plaintiffs seek to change." App. 2a, 70a. As it acknowledged, "many courts have found a contradiction between the democratic ideals upon which this country is founded and the exclusion of District residents from congressional representation." App. 70a. Judge Oberdorfer's dissent powerfully illustrates that reasonable minds can and do differ as to whether that contradiction must be resolved in the manner chosen by the two judges in the majority below.

District residents pay the national government's taxes, serve in its Armed Forces, and fight in its wars, but they are denied any vote in the Congress that levies these taxes and declares these wars. District residents are also subject to special "local" laws that apply in the District alone, enacted by a Congress that is totally unaccountable to the District citizenry. A vivid example is provided by the appropriations riders enacted in 1998 and 1999 prohibiting the Corporation Counsel or any other official of the District of Columbia from spending District funds to pursue this litigation. *See* Omnibus Appropriations Act of 1998, Pub. L. 105-277, § 151, 112 Stat. 2681; Consolidated Appropriations Act of 1999, Pub. L. 106-113, § 146, 113 Stat. 1501, 1523. The District of Columbia is thus the glaring "anomaly in our system of government, where the law makers are chosen by others than those for whom they make the laws."[3]

Nothing in the Constitution dictates this result. There is no provision denying U.S. citizens resident in the nation's capital the right to be counted as "People of the several States" for purposes of congressional representation. To the contrary, the early residents of the District were among "we the people" who ratified the Constitution, and the notion that any part of that magnificent compact was intended to take away the right of representation upon which the new country had staked its claim to the future should be unthinkable. That the disenfranchisement of District residents became accepted as the prevailing orthodoxy is a matter of historical accident, perhaps even acquiescence, but not constitutional necessity.

The majority below believed that its restrictive reading of the phrase "People of the several States" as excluding residents of the nation's capital was compelled by "longstanding judicial precedent, as well as the Constitution's text and history." As we show below, each of these premises

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[3] President John Tyler, *quoted in* James Hugh Reely, *Democracy or Despotism in the Nation's Capital* 58 (1939).

raises substantial questions and should receive plenary consideration by this Court.

A. Only This Court Can Resolve the Conflict Between The Dicta In Its Early Cases, Which the District Court Believed Controlling, And The Court's Subsequent Cases Recognizing The Right To Vote As The Central Attribute of National Citizenship.

The district court majority repeatedly stated that it was compelled to interpret Article I's reference to the election of representatives by "the people of the several States" as excluding citizens residing in the nation's capital because of prior statements from this Court. Specifically, the majority believed itself constrained by: (1) a holding in 1805 that the reference to a "State" in Article III did not include the District of Columbia, *see Hepburn & Dundas*, 6 U.S. (2 Cranch) at 452; (2) a 180-year old observation, irrelevant to the holding of the case, that the inhabitants of the District are "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government," *see Loughborough*, 18 U.S. at 324 ; and (3) a page and a half summary affirmance of a 1964 decision denying District residents a right to vote in Maryland's Senate elections, *see Albaugh*, 379 U.S. at 27. As Judge Oberdorfer pointed out, none of these cases squarely addressed the voting rights of D.C. citizens under Article I, and predate the Court's decisions recognizing the right to vote as the fundamental bulwark of our constitutional democracy. App. 95a-100a. Nonetheless, the majority clearly believed its hands were tied. *See* App. 38a ("It is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since."); App. 57a ("We must apply the law as it now stands and, until the Supreme Court instructs otherwise, that law is set forth in *Albaugh*.")

The citizens of the District of Columbia, denied the right to voting representation in Congress for over 200 years,

deserve to have this Court *directly* and *fully* consider whether their disenfranchisement is consistent with all relevant principles of American constitutional democracy. It is not enough that the status of citizens living in the District may have been obliquely mentioned in dicta in the early nineteenth century. Today's disenfranchisement of hundred of thousands of Americans must be considered in light of the country's evolution towards universal suffrage in the twentieth century, an evolution that reflects this Court's willingness to confront its own precedents and to re-evaluate the meaning of citizenship under our Constitution.

Although the constitutional framework for universal suffrage was laid with the ratification of the Reconstruction Era amendments, this Court did not begin to give those amendments real-life meaning until 1915, when it struck down an Oklahoma "grandfather clause" under which prospective voters had to pass examinations on the state constitution unless their ancestors had voted in an election prior to 1866. *Guinn and Beal v. United States*, 238 U.S. 347 (1915), represented an about-face from the deference that the Court had shown to similar facially non-discriminatory laws in *Giles v. Harris*, 189 U.S. 475 (1903), and *Williams v. Mississippi*, 170 U.S. 213 (1898). In *Smith v. Allwright*, 321 U.S. 649 (1944), this Court reversed its decision only nine years earlier in *Grovey v. Townsend*, 295 U.S. 45 (1935), and struck down a Texas Democratic Party rule forbidding non-whites from voting in the party primary as a violation of the Fourteenth Amendment's equal protection guarantee.

In the 1960s, this Court continued to revisit its prior opinions upholding restrictions on the franchise, and the protection of voting rights emerged as one of the bedrocks of constitutional interpretation. A critical breakthrough came in 1964, when the Court established the constitutional principle of "one person, one vote," and applied it to strike down congressional and state election districts made up of unequal numbers of people. *See Wesberry*, *supra*; *Reynolds v. Sims*, 377 U.S. 533 (1964). *Wesberry* struck down malapportioned

congressional districts in Georgia under Article I, § 2, reversing the Court's decision seventeen years earlier that congressional apportionment claims were non-justiciable. *See Colegrove v. Green*, 329 U.S. 828 (1946). *Reynolds* struck down an unequal apportionment of the Alabama state legislature under the equal protection clause, and ultimately led to the wholesale reapportionment of dozens of state legislatures. Both decisions placed decisive emphasis on the vital importance of the right to vote in our representatives democracy.

Following on the heels of *Wesberry* and *Reynolds*, the Court vindicated the principle of "one person, one vote" by striking down a succession of other impediments on the right to vote. Between 1965 and 1972, the Court invalidated, as contrary to constitutional principles, franchise restrictions based on military service, constitutional interpretation tests, poll taxes, property requirements, residence on a federal enclave, and durational residency requirements. *See Carrington v. Rash*, 380 U.S. 89 (1965) (military service); *Louisiana v. United States*, 380 U.S. 145 (1965) (test of constitutional interpretation); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (poll tax in state elections);[4] *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (property and bachelorhood); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (property taxpayer requirement for voting in bond election); *Evans v. Cornman*, *supra* (residence in federal enclave); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (one-year durational residency requirement).

In large part due to this Court's decisions, the founding ideal of government by "the consent of the governed" has become a reality for all Americans in the United States proper, except for the citizenry of the nation's capital. Plenary consideration by this Court is necessary to consider whether

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[4] The decision in *Harper* overruled the Court's decision fifteen years earlier in *Butler v. Thompson*, 341 U.S. 937 (1951).

the restrictive reading of Article I adopted by the district court in apparent deference to nineteenth century dicta is faithful to the principle that "[o]ur Constitution *leaves no room* for classification of people in a way that unnecessarily abridges" the precious right to have a voice in the election of those who govern us. *Wesberry*, 376 U.S. at 17 (emphasis added).

B. The Constitutional Text and History Do Not Compel The Interpretation That Citizens Residing in the National Capital Are Denied The Right to Congressional Representation.

No article or amendment of the Constitution expressly divests or deprives U.S. citizens resident in the District of Columbia of the right to representation in the House of Representatives. Article I, § 2, simply provides that the "House of Representatives shall be composed of Members chosen every second Year by the People of the several States" and a separate provision, in Article I, § 8, specifies that the federal government may be located in a District created "by Cession of particular States, and the Acceptance of Congress." In the opinion below, the two-judge majority held that the negative inference of these two provisions was that residents of the nation's capital are not among the "People of the several States" entitled to representation in the legislature that governs them.

That conclusion cannot be reconciled with the many decisions in which this Court has rejected the most literal reading of a constitutional provision in favor of one that is more harmonious with the principles enunciated by the document as a whole and in keeping with its underlying purposes. A few examples should suffice: In construing the scope of the Eleventh Amendment, the Court has held that the Amendment prohibits suits by a State's own citizens even though its *literal* text applies only to suits "by Citizens of another State, or by Citizens or Subjects of any Foreign State," and also encompasses certain suits in admiralty, even though the *literal* text refers solely to suits "in law or equity." *See, e.g., Hans v. Louisiana*, 134 U.S. 1 (1890); *Principality of*

Monaco v. Mississippi, 292 U.S. 313, 322 (1934). Similarly, although the First Amendment *literally* provides only that "*Congress* shall make no law . . . abridging the freedom of speech," the Court has long recognized that freedom of speech and of the press are protected from impairment by the States as well. *See, e.g., Gitlow v. People of New York*, 268 U.S. 652, 666 (1925). Likewise, the fact that the *actual text* of the Fifth Amendment does not contain a specific equal protection guarantee applicable to the federal government was no barrier to this Court's conclusion that the scope of that Amendment's due process protections were broad enough to prohibit racial segregation in D.C. public schools. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The *Bolling* Court unanimously construed the Fifth Amendment guarantees against certain federal action to take on new meaning in light of the Fourteenth Amendment's subsequent guarantees against certain state action, because it was "unthinkable that the . . . Constitution would impose a lesser duty on the Federal Government" than on the States. *Id.*

Even more relevant, this Court has recognized that "[w]hether the District of Columbia constitutes a 'State' . . . within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved." *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). This Court has repeatedly treated the residents of the District as residents of a "State" where necessary to assure that they are afforded the same constitutional rights and privileges as other U.S. citizens. Thus, the Court has held that Article III's reference to federal court jurisdiction over cases "between Citizens of different States" does not bar Congress from conferring diversity jurisdiction in cases brought by a District resident. *See National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). The District has also been treated as a State for purposes of the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" *See*

Callan v. Wilson, 127 U.S. 540 (1888); *Clawans v. District of Columbia*, 300 U.S. 617 (1937); *District of Columbia v. Colts*, 282 U.S. 63 (1930). Finally, the Court has held that the "courts of the district are bound, equally with courts of the states, to observe the command of the full faith and credit clause, wherever applicable," even though that clause *literally* applies only to each "State." *See Loughran v. Loughran*, 292 U.S. 216, 228 (1934).

The common theme in these cases is that residents of the nation's capital should be treated as residents of a State where necessary to avoid what would otherwise be an inexplicable gap in the constitutional fabric that would deprive District citizens of important rights that the framers could not have intended to deny them. As Justice Rutledge wrote in his concurrence in the *Tidewater* case:

> [W]e should not blink the fact that, whatever the need for federal jurisdiction over suits between litigant citizens of the several states, the same need equally compels the safeguards of federal trial for suits brought by citizens of the District of Columbia against citizens of the several states.
>
> ***
>
> I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it.

337 U.S. at 623, 625; *see also Bolling*, 345 U.S. at 500.

Nor does history reveal any original intent to discriminate against District residents by disenfranchising them in the circumstances presented here. At the time the Constitution was adopted, the framers had agreed to the formation of a national capital district, but had not agreed on the site of the new capital. Although the "District Clause" in

Article I, § 8 provided that the capital district would be subject to the exclusive control of Congress, that clause did not provide that District citizens would be disenfranchised in congressional elections. The purpose of the Clause was not to disenfranchise these Americans, but rather to assure the security and independence of the fledgling national government against potential threats or manipulation by state governments. Security concerns dominated the debates on the creation of a national capital to the exclusion of attention to the rights of the future residents of the capital, including rights of suffrage.[5] As one commentator observed:

> "It cannot be overemphasized that throughout the debates regarding the selection of the site and the adoption of the District clause, the desire for an area free from state control was paramount. . . . At no time during the prolonged debate [on the creation of a capital district] was there any mention of the effect upon the franchise of the then residents by the cessions and the acceptance by Congress of the ceded territory. . . ." Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 Geo. L.J. 207, 213-14 (1957-58).

After several years of bargaining over the site of the new capital, Congress settled on a portion of land on the Potomac River. The relatively few residents of these lands were citizens of Virginia and Maryland at the time, eligible to vote in congressional elections to the same extent as other residents of those States.

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[5] *See* Kenneth R. Bowling, The Creation of Washington, D.C.: The Idea and Location of the American Capital (1991); Peter Raven-Hansen, *Congressional Representation for the District of Columbia*, 12 Harv. J. on Legis. 167, 169-72, 184-85 (1975).

Significantly, these individuals did not stop voting in congressional elections when the District of Columbia was created. The District came into being in 1790, when the federal government enacted a statute accepting the cession of the District lands.[6] The acceptance statute provided, however, that the national capital would not be relocated to the District of Columbia until 1800, and that the laws of Maryland and Virginia would continue to have force in the newly-created federal District in the interim. Eligible District residents continued to vote in their former States during this period. This extraterritorial voting ended only in February of 1801, when Congress first actively asserted its jurisdiction over the District of Columbia.[7] At that time, Maryland and Virginia laws ceased to enforce their laws in the District, and District residents ceased to vote in Maryland or Virginia elections.[8]

As of 1800, there were only 14,288 residents of the District—far fewer than the 30,000 residents that the Constitution established as the smallest permissible Congressional District. *See* U.S. Const., Art. I, § 2 (setting minimum district size of 30,000). Thus, although the disenfranchisement of the District may not have been perceived as an egregious misreading of our Constitution

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[6] An Act for establishing the temporary and permanent seat of the Government of the United States, ch. 28, 1 Stat. 130 (1790).

[7] An Act concerning the District of Columbia, ch. 15, 2 Stat. 103 (1801).

[8] *See* Raven-Hansen, *supra*, at 174-77. Virginia and Maryland law at the time required ownership of real property and residence in the county where the citizen proposed to vote as a pre-requisite to voting. *See* William Tindall, Origin and Government of the District of Columbia 17-18 (1908). After Maryland and Virginia law ceased to apply in the District, those requirements appeared to make District citizens ineligible to vote in Maryland and Virginia, and they ceased to vote in national elections after February of 1801.

when it occurred, it clearly has become one now that the District of Columbia is home to over half a million Americans.

Especially in the absence of any indication that the founders intended to disenfranchise the residents of a District that would grow in size to equal or exceed the population of some States,[9] the district court's restrictive reading of Article I as necessarily and forever excluding District inhabitants from congressional representation does not do justice to this Court's long line of cases that endeavor to make sense of the Constitution as a whole. *See supra* 14-16. The Constitution should not be read "'with the narrow literalism of a municipal code or a penal statute, but so that its high purposes should illumine every sentence and phrase of the document and be given effect as part of a harmonious framework of government.'" *Tidewater*, 337 U.S. at 618 n. 11 (Rutledge, J., concurring). Moreover, "it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence," with its guarantee of the inalienable right of self-government. *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897).

The court below erred when it failed to follow these principles of constitutional interpretation and refused to consider alternative constructions of Article I, § 2. It was open to the court, for example, to construe Article I, § 2, to allow District citizens to vote in congressional elections by treating the District as if it were a "State" for purposes of that provision. As the court below recognized, the word "state" in the Constitution does not inherently mean one of the fifty States only, and its meaning in any particular constitutional provision depends on the full context in which it appears. *See* App. 19a; *see also District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). Here, the overriding contextual circumstance is the fact that District citizens' most fundamental rights are at

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[9] The population of the District of Columbia is larger than that of Wyoming and close to that of Vermont.

stake and no compelling rationale has been offered why the framers would have intended to deny them those rights. Unless District residents are permitted to vote in congressional elections, they will be denied any vote in the body that serves as their national and state legislature and will be rendered unequal and inferior to their peers in the fifty States.

Alternatively, for the limited purpose of vindicating their constitutional right to vote in congressional elections, District residents could be deemed to retain a residual citizenship in Maryland—the State from which the modern-day District of Columbia was created. As Judge Oberdorfer so powerfully explained, the cession legislation that created the national capital was and is incapable of taking away the constitutional rights of District residents. App. 95a-100a; *see, e.g., O'Donoghue v. United States*, 289 U.S. 516, 541 (1933). Although the cession legislation may take away District residents' Maryland citizenship for most purposes, it has no power to strip them of their constitutional right to vote in congressional elections, nor to strip them of their state citizenship to the extent that that citizenship is inextricably linked to rights of national citizenship. District residents living here today thus have the same right to vote in congressional elections that they would have if the cession statutes had not cut off their Maryland citizenship for general purposes. Any other conclusion would be incompatible with the democratic principles that the Constitution was adopted to secure.

These alternative readings of Article I, § 2, have ample precedent. Americans who live overseas, in federal enclaves, or on tribal lands all have voting representation in Congress, which confirms that the reference to election by the "People of the several States" can and has been construed other than literally where necessary to preserve the fundamental principles of our constitutional democracy. These practices also confirm that, in providing for voting by the "People of the several States," the Constitution does not make States the *source* of congressional voting rights, but simply used States

as the means of distributing rights that belonged to the people. As this Court recently observed, the Constitution is built on the "critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government." *U.S. Term Limits*, 514 U.S. at 794. Thus, "the right to choose representatives belongs not to the States, but to the people." *Id.* at 820-21.

C. Article I, § 2, Must Be Construed In Harmony With Subsequent Constitutional Amendments Establishing the Right to Vote As The Pillar of Our Constitutional Democracy.

As noted, the opinion below fails to analyze the Constitution as a whole, in its present form, and with due regard for the central importance of the right to vote in our constitutional scheme. Whatever the court below believed to be the original effect of Article I, § 2, it failed to make the further inquiry whether its interpretation should be modified in light of subsequent amendments to the Constitution that established the right to vote as a fundamental attribute of U.S. citizenship. That right is inherent in and protected by the guarantees that every American citizen in this country is entitled to the equal protection of the laws, due process of law, and the privileges and immunities of national citizenship.

1. The Fourteenth Amendment to the Constitution forbids each State to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. The Fifth Amendment due process clause applicable to the District of Columbia extends the same guarantee of equal protection against the federal government. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (Fifth Amendment equal protection claims are treated "precisely the same" as those made under the Fourteenth Amendment). Under the equal protection principles guaranteed by these amendments, governmental

classifications that selectively distribute the right to vote are subject to the strictest constitutional scrutiny. *See Dunn*, 405 U.S. at 337; *Phoenix v. Kolodziejski*, 399 U.S. 204, 205 (1970); *Cipriano*, 395 U.S. at 704.

The robust protection accorded the right to vote under the equal protection clause flows from this Court's recognition that voting is one of our most fundamental rights. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17-18. Anyone deprived of the franchise is therefore rendered inherently unequal to his or her fellow citizens. Justice Blackmun forcefully explained this reasoning in *Plyler v. Doe*:

> "[T]he right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process. Those denied the vote are relegated, by state fiat, in a most basic way to second-class status." *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring).

In *Wesberry* and *Reynolds*, this Court distilled the protections due the right to vote under the equal protection clause into a single phrase: "one person, one vote." That principle reflects the inestimable importance of the right to vote in securing political equality in our democracy. It also reflects the command of the equal protection clause that citizens with an equal stake in a legislature's decisions should have "an equally effective voice in the election of members of [that] legislature." *Board of Estimate v. Morris*, 489 U.S. 688, 693 (1989). And it reflects the self-evident truth that our government derives its legitimacy from the consent of "the whole people" subject to its laws. *U.S. Term Limits*, 514 U.S. at 839 (Kennedy, J., concurring).

The equal protection guarantee does not tolerate discrimination based on place of residence. In striking down malapportioned state election districts, this Court in *Reynolds* observed that "the weight of a citizen's vote cannot be made to depend on where he lives." 377 U.S. at 567. "Legislators represent people, not trees or acres." *Id.* at 562. They are "elected by voters, not farms or cities or economic interests." *Id.* The voting rights of citizens thus depend on whether they will be *governed* by the results of an election, and not on "where they happen to reside." *Id.* at 563. "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Id.* at 566.

These equal protection principles apply foursquare to the citizens of the District of Columbia. Their consent to their government is just as important as the consent of other Americans. They are subject to the same burdens of citizenship as their peers in the fifty States. And they have an even greater stake in congressional elections than do other Americans, because Congress functions both as the national and state legislature in the District. District citizens thus have "an inalienable right to full and effective participation in the political processes of legislative bodies of the Nation, State, or locality as the case may be[.]" *Reynolds*, 377 U.S. at 565.

In addition to rendering District citizens constitutionally unequal to the residents of the fifty States, their disenfranchisement also renders them unequal to millions of Americans who reside on thousands of federal enclaves in the United States, including military bases, forts, national parks, and national research facilities. Although Congress may "exercise like Authority" over enclaves as it does the District of Columbia—both are created by the same constitutional clause—this Court has recognized that enclave residents have a constitutional right to vote in federal and state elections in the States from which the enclave was created. *See Evans v. Cornman*, *supra*. District citizens have at least

as great a stake in elections to Congress, which governs them both as a national and state legislature. Equal protection therefore requires that District citizens, too, be permitted to vote in congressional elections. Any other result would deny these citizens constitutional equality with their peers in the States and with millions of Americans residing on federal enclaves.

2. The right to vote in congressional elections is also protected by the Fifth Amendment guarantee that no person shall be "deprived of life, liberty, or property without due process of law." U.S. Const., amend. V. That clause places certain fundamental liberties beyond the government's power to curtail no matter what procedures it follows. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 764 & n.17 (1997). Fundamental liberties protected from government encroachment are those that are "deeply rooted in our history and traditions" or "'implicit in the concept of ordered liberty.'" *Id.* at 721; *see also Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 951 (Rehnquist, C.J., concurring and dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 1937)).

It is hard to conceive of a right more firmly anchored in our traditions or more deeply ingrained in the concept of "ordered liberty" than a citizen's right to vote in elections to his or her national or state legislature. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 198 (1992) (the right to vote is "a right at the heart of our democracy"); *Illinois St. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("we have often reiterated that voting is of the most fundamental significance under our constitutional structure."); *Reynolds*, 377 U.S. at 561-62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.")

A comparison of the right to vote with other rights held to be implicit in the concept of ordered liberty confirms its place within that group. This Court has held, for example, that the right to trial by jury, the right to exclude illegally seized

evidence from criminal trials, and the right to confront opposing witnesses are so fundamental and essential to liberty that they are incorporated against the States by the due process clause of the Fourteenth Amendment. *See Duncan v. Louisiana*, 391 U.S. 145, 149, 155 (1968); *Pointer v. Texas*, 380 U.S. 400, 404 (1965); *Mapp v. Ohio*, 367 U.S. 643, 650, 655 (1961). The Court has also held that access to abortion is a fundamental right. *See Casey*, 505 U.S. at 846-52. While these are surely important rights, a number of democratic societies function without them. By contrast, no democracy functions without the right to vote, and no other democracy in the world precludes residents of its national capital from voting in elections to the national legislature. *See* CRS Report, *DC Statehood: The Historical Context and Recent Congressional Actions*, at 14 & n.44 (1994).

The denial of District citizens' right to vote in congressional elections also violates their Fifth Amendment right to procedural due process. The due process clause applies to *all* governmental deprivations of "life, liberty, or property," whether by judicial, executive, or legislative action. In the familiar judicial or administrative contexts, the process that is due is notice and a hearing prior to the deprivation. *See generally Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). A different process is due, however, in the legislative context. When the government enacts legislation affecting a broad group of individuals, "it is impracticable that everyone should have a direct voice in its adoption." *Id.* Instead, those who are affected by legislation "are given notice and a hearing through their representatives, whose power is a direct manifestation of the citizens' consent." *Missouri v. Jenkins*, 495 U.S. 33, 66 (1990) (Kennedy, O'Connor, Scalia, JJ., and Rehnquist, C.J., concurring). In other words, the process required with respect to legislation "is not due process through individual hearings . . . but through elective representation, partisan politics, and the ultimate sovereignty of the people to vote out of office those legislators who are unfaithful to the public

will." *Rogin v. Bensalem Township*, 616 F.2d 680, 694 (3d Cir. 1980).[10]

Here, District citizens have been denied this most basic right. That denial undermines the fairness and legitimacy of legislative actions affecting their life, liberty, and property, just as would be the case if District citizens were denied notice and a hearing with regard to judicial or administrative actions. The simple fact is that, where a group of citizens is excluded from representation in their legislature, it contradicts the framers' core assumption that there will be "distinct and discernable lines of political accountability . . . between the citizens and the Federal Government." *United States v. Lopez*, 514 U.S. 549, 576 (1995). There can be no more fundamental violation of the process that is due American citizens under our Constitution.

3. The disenfranchisement of District citizens further denies them the most important of the constitutionally protected "privileges" of national citizenship. The Constitution protects those privileges of citizenship that "arise out of the nature and essential character of the National Government." *Twining v. New Jersey*, 211 U.S. 78, 97 (1908). Foremost among these rights of national citizenship is "the right to vote for national officers." *Id.*

The Fourteenth Amendment's guarantee protecting the "privileges and immunities" of national citizenship is "a limitation on the powers of the National Government as well as the States." *Saenz v. Roe*, 526 U.S. 489, 507 (1999); *see*

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[10] *See also Minnesota St. Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984) (there is no first amendment or due process right to a hearing before the legislature because "[d]isagreement with public policy and disapproval of officials' responsiveness . . . is to be registered principally at the polls"); *Philly's v. Byrne*, 732 F.2d 87, 95 (7th Cir. 1984) (with respect to legislation, "the process due is found in the electorate's power over its chosen representatives") (Wood, J., concurring).

also U.S. Term Limits, 514 U.S. at 843 (noting that "federal citizenship in and of itself suffices for the assertion of rights under the Constitution"). As against the federal government, a privilege of national citizenship "does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." *In re Quarles*, 158 U.S. 532, 536 (1895) (listing right to vote as such a privilege of citizenship).

The right to vote in national elections arguably did not rank as a privilege of national citizenship prior to 1868, before the Fourteenth Amendment was adopted and when a majority of Americans lacked the right to vote in national elections. *See Minor v. Happersett*, 88 U.S. 162 (1874) (rejecting claim that women had a constitutional right to vote under the privileges or immunities clause). But it has surely become such a privilege today, when nearly all American adults possess that basic right. *Cf. Reynolds*, 377 U.S. at 612 (Harlan, J., dissenting) (noting de facto overruling of *Minor v. Happersett*). The constitutional transformation that has taken place in this century demonstrates that the right to vote is a core attribute of citizenship. As this Court recognized in *Reynolds*, "To the extent that a citizens' right to vote is debased, he is that much less a citizen." 377 U.S. at 567. "The right to vote for national officers" is thus a vital "privilege and immunity of national citizenship." *Oregon v. Mitchell*, 400 U.S. 112, 277 (1970) (Douglas, J., concurring); *see also U.S. Term Limits*, 514 U.S. at 838-45 (Kennedy, J., concurring); *United States v. Classic*, 313 U.S. 299, 315 (1941); *Twining*, 211 U.S. at 97.

Congress expressly invoked its power to enforce the "privileges" of national citizenship secured by the Fourteenth Amendment when it enacted the Overseas Citizens Voting Rights Act of 1975, 89 Stat. 1142 (1975), which secured the rights of millions of American citizens living overseas to vote in federal elections. The House Report on that legislation declares: "the right to vote for national officers is an inherent

right and privilege of national citizenship, and . . . Congress retains the power to protect this right and privilege under [section V of] the 14th amendment." H.R. No. 94-649 Part I at p.5 (December 19, 1975).

Privileges of citizenship that arise solely from the "relationship between the people of the Nation and their National government," *U.S. Term Limits,* 514 U.S. at 845, can have little meaning if they do not protect citizens' most critical link to that government: the privilege of voting for representatives in Congress. A State may not impair its citizens' privileges of national citizenship by restricting their right to vote for the congressional representatives of their choice. *Id.* at 844-45. The defendants here have violated the same constitutional privilege by denying the right of District residents to congressional representation.

In sum, the decision of the court below that Article I, § 2, must be rigidly construed such that the equal protection rights, due process rights, and privileges and immunities of U.S. citizens become immeasurably lessened at the border of the nation's capital is not faithful to the principles upon which this country was founded, its history of and commitment to removing barriers to universal suffrage, and this Court's precedents interpreting the Constitution as a document whose textual provisions must be construed in harmony with each other. To the extent that the majority felt itself constrained by prior language from this Court's decisions, we respectfully suggest that it is incumbent upon this Court to directly and fully consider the issue. Especially because we have been deprived of a representative vote by the actions of the executive and legislative branches of government, this Court should note probable jurisdiction and grant plenary consideration. We the People of the District of Columbia deserve no less.

CONCLUSION

Probable jurisdiction should be noted.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2000

CLIFFORD ALEXANDER, ET AL.,

Appellants,

v.

WILLIAM M. DALEY, ET AL.,

Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPENDIX

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LOIS E. ADAMS, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 98-1665
	)	
WILLIAM J. CLINTON, *et al.*	)	
	)	
Defendants.	)	

CLIFFORD ALEXANDER, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 98-2187
	)	
WILLIAM M. DALEY, *et al.*	)	
	)	
Defendants.	)	

98-1665, 98-2187

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

March 20, 2000, Decided

Before: GARLAND, Circuit Judge, and OBERDORFER and KOLLAR-KOTELLY, District Judges.

PER CURIAM opinion for the Court filed by Judges GARLAND and KOLLAR-KOTELLY, in which Judge OBERDORFER joins as to Parts I, II and III.

OBERDORFER, District Judge, filed an opinion dissenting in part.

PER CURIAM: In these consolidated lawsuits, seventy-five residents of the District of Columbia, along with the District of Columbia itself, challenge as unconstitutional the denial of their right to elect representatives to the Congress of the United States. Plaintiffs argue that their exclusion from representation is unjust. They note that the citizens of the District pay federal taxes and defend the United States in times of war, yet are denied any vote in the Congress that levies those taxes and declares those wars. This, they continue, contravenes a central tenet of our nation's ideals: that governments "derive their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2.

None of the parties contests the justice of plaintiffs' cause. President Clinton and the other defendants, however, maintain that the dictates of the Constitution and the decisions of the Supreme Court bar us from providing the relief plaintiffs seek. Any such relief, they say, must come through the political process.

Plaintiffs' grievances are serious, and we have given them the most serious consideration. In the end, however, we are constrained to agree with defendants that the remedies plaintiffs request are beyond this court's authority to grant.

I

On June 30, 1998, D.C. resident Lois Adams and nineteen co-plaintiffs filed suit in *Adams v. Clinton*. Their complaint alleges that the failure to apportion congressional representatives to the District, and to permit District residents to vote in House and Senate elections, violates their constitutional rights to equal protection of the laws and to a

republican form of government. They further contend that those same rights are violated by Congress's exercise of exclusive jurisdiction over the District, and by its denial to plaintiffs of "a state government, insulated from Congressional interference in matters of local concern." *Adams* Compl. ¶ 109. In connection with the latter claim, they seek an injunction directing the District of Columbia Financial Responsibility and Management Assistance Authority, commonly known as the "Control Board,"[1] to "take no further action" and to "disband itself." *Id.* at 28. The *Adams* complaint names as defendants President William Jefferson Clinton, the Clerk and the Sergeant at Arms of the House of Representatives, and the Control Board.

On September 14, 1998, District of Columbia resident Clifford Alexander, fifty-six other residents of the District, and the District itself filed suit in *Alexander v. Daley*. Like their counterparts in *Adams*, the *Alexander* plaintiffs allege that their inability to vote for representatives and senators violates their rights to equal protection and to a republican form of government. The *Alexander* plaintiffs also allege that the denial of congressional representation violates their right to due process and abridges their privileges and immunities as citizens of the United States. Finally, they contend that the denial of their right to vote violates Article I and the Seventeenth Amendment of the Constitution, which provide that the members of the House shall be chosen by "the People of the several States" and that senators shall come "from each State, elected by the people thereof." U.S. CONST. art. I, § 2, cl. 1; *Id.* amend. XVII, cl. 1. The *Alexander* complaint names as defendants Secretary of Commerce William M. Daley; the Clerk, the Sergeant at Arms, and the Chief Administrative Officer of the House of Representatives; the Secretary and the

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[1] The Control Board was established pursuant to the District of Columbia Financial Responsibility and Management Assistance Act, Pub. L. No. 104-8, 109 Stat. 97 (1995).

Doorkeeper/Sergeant at Arms of the Senate; and the United States.

On November 3, 1998, a single-judge district court consolidated the two lawsuits. *See Adams v. Clinton*, Civ. No. 98-1665 (D.D.C. Nov. 3, 1998) (Oberdorfer, J.). On November 6, that court granted motions by both sets of plaintiffs to appoint a three-judge district court pursuant to 28 U.S.C. § 2284(a), which provides that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." *See Adams v. Clinton,* 26 F. Supp. 2d 156, 160 (D.D.C. 1998) (Oberdorfer, J.). This court subsequently convened, disposed of certain preliminary motions, *see Adams v. Clinton,* 40 F. Supp. 2d 1, 5 (D.D.C. 1999), and heard oral argument.

Currently pending are motions to dismiss or for summary judgment on behalf of each of the parties. All parties agree that the consolidated lawsuits contain no genuine issue as to any material fact and that decision on the pending motions is appropriate. We first address whether all of the claims disputed in these motions are properly before this three-judge panel. We then address the standing of plaintiffs to pursue those claims that are properly before us. Finally, we examine the merits of those claims.

II

The parties have not asked us to revisit the original judge's determination that this case falls within the confines of the three-judge court statute, and we will not do so insofar as the complaints allege the failure to apportion members of the House of Representatives to the District. We have, however, determined that this court should relinquish jurisdiction over the other claims raised in the complaints and pending motions. These include both complaints' demands for representation in the Senate, which, because they do not "challenge the constitutionality of the apportionment of congressional districts," plainly fall outside the jurisdictional mandate of

section 2284(a). They also include the *Adams* plaintiffs' challenges to Congress' continuing exercise of exclusive authority over matters of local concern, particularly their challenge to the existence of the Control Board. Although these claims involve some issues akin to those found in the representation claims, they do not directly challenge congressional apportionment and therefore also fall outside the language of section 2284(a). *Cf. Public Serv. Comm'n v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 625 (1941) (holding that three-judge court should not consider "questions not within the statutory purpose for which the two additional judges have been called").

Not only do the aforementioned claims fall outside the scope of section 2284(a), but they are also not the type of claims over which three-judge courts commonly assert supplemental jurisdiction. *See generally Allee v. Medrano*, 416 U.S. 802, 812 (1974) (indicating that three-judge courts may assert ancillary jurisdiction over certain non-three-judge claims); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504 n.5 (1972) (same). For example, it is not necessary to resolve the Senate and Control Board claims in order to provide a "final and authoritative decision of the controversy" among the parties involved in the apportionment claims. *Public Serv. Comm'n*, 312 U.S. at 625 n.5; *see also Allee*, 416 U.S. at 812 n.8. Nor is this a case in which resolution of the non-three-judge claims would allow us to dispose of the claims that provide the basis for our jurisdiction. *See Allee*, 416 U.S. at 812 n.8; *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 287-88 (1963) ("Once [a three-judge court has been] convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court."); *see also Rosado v. Wyman*, 397 U.S. 397, 402 (1970) (stating that three-judge court must decide non-constitutional claims "in preference to deciding the original constitutional claim" for which court convened).

Because the claims that do not directly challenge the apportionment of representatives do not implicate the concerns

that have traditionally caused three-judge courts to exercise supplemental jurisdiction, it may be improper for us to exercise such jurisdiction over them. *Cf. Perez v. Ledesma,* 401 U.S. 82, 86-87 (1971) (holding that three-judge court convened to hear challenges to certain state laws did not have jurisdiction over related attack on similar local ordinance). Even if our jurisdiction over those claims were proper, however, we would retain the discretion not to exercise it. *See Turner Broad. Sys., Inc. v. FCC,* 810 F. Supp. 1308, 1314 (D.D.C. 1992) (three-judge court). As we noted at an earlier stage in these proceedings, the Supreme Court has indicated that "even when [a] three-judge court has jurisdiction over [an] ancillary claim, 'the most appropriate course' may be to remand it to [a] single district judge." *Adams,* 40 F. Supp. 2d at 5 (quoting *Hagans v. Lavine,* 415 U.S. 528, 544 (1974)); *see also Diven v. Amalgamated Transit Union Int'l & Local 689,* 38 F.3d 598, 601 (D.C. Cir. 1994).

Remand of the non-apportionment claims is the appropriate course here. There is no doubt that resolution of the Senate and Control Board claims would take us far afield from the core of the original jurisdictional grant, and at the same time deprive the Court of Appeals of the opportunity to review our work. *See* 28 U.S.C. § 1253 (providing that final judgment of three-judge district court is appealable directly to Supreme Court). To avoid reaching "constitutional questions we need not reach, asserting authority we may not have," *Adams,* 40 F. Supp. 2d at 5, we will address here only those claims that challenge the constitutionality of an apportionment of congressional districts that fails to account for the District of Columbia and its residents. The balance of the claims are remanded for determination by the single district judge before whom they were originally filed.

III

Before reaching the merits of the claims for representation in the House, we must determine two further questions regarding our jurisdiction: whether plaintiffs' challenge represents a nonjusticiable political question, and

whether plaintiffs have the requisite standing to bring it. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83 (1998) (holding that Article III courts must consider jurisdictional questions before deciding merits of causes of action).

A

The defendant House officials contend that this case presents a nonjusticiable political question because there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr,* 369 U.S. 186, 217 (1962). Specifically, they assert that because Article I of the Constitution limits voting to residents of the fifty states, only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise.

We do not agree that the political question doctrine bars our consideration of this case. The Supreme Court has repeatedly declared that "constitutional challenges to apportionment are justiciable." *Franklin v. Massachusetts,* 505 U.S. 788, 801 & n.2 (1992) (plurality opinion of O'Connor, J.) (citing *Department of Commerce v. Montana,* 503 U.S. 442 (1992)); accord *Wesberry v. Sanders,* 376 U.S. 1, 6 (1964). The resolution of this dispute is "textually committed" only if we assume before we begin that plaintiffs cannot prove what they allege: that District residents are among those qualified to vote for congressional representatives under Article I. That purely legal issue is one the courts are perfectly capable of resolving, and is similar to those the Supreme Court has repeatedly found appropriate for judicial resolution. *See, e.g., Montana,* 503 U.S. at 458-59 ("The interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary. The political question doctrine presents no bar to our reaching the merits of this dispute . . . .") (citations omitted); *Baker,* 369 U.S. at 226.

B

Next, we consider plaintiffs' standing to bring these consolidated actions. The Supreme Court has summarized the requirements for standing as follows:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (footnote, citations, and internal quotations omitted). For the purposes of standing analysis, we "assume the validity of a plaintiff's substantive claim." *Catholic Soc. Serv. v. Shalala,* 12 F.3d 1123, 1126 (D.C. Cir. 1994); accord *Warth v. Seldin,* 422 U.S. 490, 500 (1975) ("Standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ."); *Claybrook v. Slater,* 111 F.3d 904, 907 (D.C. Cir. 1997); *United States House of Representatives v. United States Dep't of Commerce,* 11 F. Supp. 2d 76, 83 (D.D.C. 1998) (three-judge court), appeal dismissed, 525 U.S. 316 (1999).

Defendants do not seriously dispute that plaintiffs' lack of representation in the House satisfies the "injury in fact" requirement. *See* Tr. of Mot. Hr'g at 70. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry,* 376 U.S. at 17 (invalidating malapportioned congressional districts). Hence, if the residents of the District are entitled to such a voice—which we

must presume for purposes of standing analysis—its denial plainly constitutes an "injury in fact." *See Department of Commerce v. United States House of Representatives,* 525 U.S. 316 (1999) (holding that resident's "expected loss of a Representative to the United States Congress" through reapportionment "undoubtedly satisfies the injury-in-fact requirement of Article III standing"); *Michel v. Anderson,* 14 F.3d 623, 626 (D.C. Cir. 1994) (noting that "[i]t is obvious that Georgia voters would have suffered an injury" if "the House were to prevent all congressmen from the State of Georgia from voting in the House").

Defendants focus instead on the second and third prerequisites of standing: the requirements of causation and redressability. That analysis in turn, focuses on the statutory process for apportionment of congressional districts. The Secretary of Commerce is required, within nine months of completing the decennial census, to report to the President the total population of each state for purposes of congressional apportionment. *See* 13 U.S.C. § 141(b).[2] Upon receiving the report, the President must transmit to Congress "a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives." 2 U.S.C. § 2a(a). "Each State shall be entitled . . . to the number of Representatives shown" in the President's statement, and within fifteen days of receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . ." *Id.* § 2a(b); *see Franklin,*

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[2] The statute provides:

> The tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be . . . reported by the [Commerce] Secretary to the President of the United States. 13 U.S.C. § 141(b).

505 U.S. at 792. The Secretary concedes that he has not included, and does not plan to include, a separate entry for the District of Columbia in his report to the President. Nor has he included, nor does he plan to include, the District's population within that of any state.

With respect to causation, the Secretary of Commerce and the Clerk of the House contend that they bear no individual responsibility for the exclusion of the District from the apportionment process because they are merely carrying out the constitutional requirement (repeated in *haec verba* in the statute) that representatives be apportioned "among the several States,"[3] and because the District of Columbia is not a state. This argument once again assumes that plaintiffs will not prevail on the merits. We, however, must assume here that plaintiffs will prevail, and hence that the District *is* a "state" for apportionment purposes and that the Constitution is not the cause of their electoral disability.

The more difficult standing question is that of redressability. Secretary Daley contends that even if we may order him to include the District's citizens within his report,[4] the President is not bound to accept that report. He further argues that we are without power to enjoin the President if he refuses to adhere to a declaration in plaintiffs' favor. Making an analogous argument, the Clerk of the House contends that the Speech or Debate Clause[5] likewise prevents us from enjoining her should she decide not to comply with our

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[3] U.S. CONST. art. I, § 2, cl. 3; 13 U.S.C. § 141(b); *see supra* note 2.

[4] *See Franklin*, 505 U.S. at 802 (plurality opinion of O'Connor, J.) (noting that "injunctive relief against executive officials like the Secretary of Commerce is within the courts' power").

[5] U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

declaration of the law. Defendants argue that, because the chain of causation may be broken in these two places, plaintiffs cannot satisfy the requirement of redressability.[6]

We are guided in our resolution of this issue by the Supreme Court's resolution of a similar dispute in *Franklin v. Massachusetts*, which arose out of a three-judge court proceeding pursuant to the same jurisdictional statute at issue here. *See* 505 U.S. 788. In that case, Massachusetts and two of its residents challenged the method used by the then-Secretary of Commerce for allocating overseas military personnel among the states for apportionment purposes—a method that resulted in Massachusetts losing a seat in the House. *See id.* at 790. The plaintiffs sued the President, the Secretary of Commerce, the Clerk of the House, and Census Bureau officials for violating the Administrative Procedure Act (APA) and the Constitution. As in this case, the defendants contended that the court could not grant injunctive relief against the President, and that absent such relief, a judgment against the remaining defendants would fail to redress the plaintiffs' injury. *See id.* at 802-03.

Although divisions among the Justices make the Court's opinion difficult to parse, it nonetheless appears that eight Justices rejected the contention that the *Franklin* plaintiffs lacked standing. Four Justices agreed with the defendants that, at a minimum, the prospect of an injunction

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[6] Defendants do not shrink from the implications of their position. As noted at oral argument, their contention would apply with equal force to a President's decision to deny representation to a state that voted against him in the last election (at least if that decision were supported by a majority in Congress). *See* Tr. of Mot. Hr'g at 54. Indeed, the Executive Branch defendants concede that, on their theory, no one would have standing to challenge a presidential decision to grant the District the vote simply by apportioning it representatives in his transmission to the Clerk. *See id.* at 54-55.

against the President was "extraordinary, and should have raised judicial eyebrows." *Id.* at 802 (plurality opinion of O'Connor, J.). Those four concluded, however, that they could avoid deciding the propriety of granting relief against the President (or the House officials) because the plaintiffs' injury was likely to be redressed by declaratory relief against the Secretary of Commerce alone. *See id.* at 803. A judgment against the Secretary would be enough to cause her to send the correct numbers, the four Justices thought, and it was fair to assume that the President and the congressional officials would then follow the law as the Court articulated it:

> [A]s the Solicitor General has not contended to the contrary, we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination.

Id. Accordingly, the four went on to consider the merits of plaintiffs' constitutional argument, ultimately holding against them. *See id.* at 806.

Four more Justices concurred in the judgment against plaintiffs without addressing standing. They did, however, conclude that the President's role in the apportionment process was strictly ministerial, and thus that the Secretary's report could be challenged as "final agency action" under the APA. *See id.* at 807, 808-17 (Stevens, J., concurring in part). "[T]he statute," these four said, "does not contemplate the President's changing the Secretary's report." *Id.* at 814. Because these four Justices went on to consider (and deny) the merits of the plaintiffs' claims, the sole Justice dissenting on the issue of standing concluded that they had necessarily found it to exist. *See id.* at 823-24 & n.1 (Scalia, J., concurring in part). Even if

that was not necessarily so,[7] the view of these four regarding the President's lack of discretion supports plaintiffs' claim of redressability. Since, in the view of these four Justices, the President is without discretion to modify the Commerce Secretary's report,[8] the ability of the court to enjoin the Secretary establishes the necessary redressability.

Deriving a governing principle from the opinions of a fragmented Court is always problematic.[9] Nonetheless, we are bound to try to discern such a principle. *Cf. Marks v. United States,* 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who

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[7] *Franklin* preceded *Steel Co.*, in which the Court expressly held that Article III courts must consider jurisdictional questions before deciding whether a plaintiff has stated a cause of action. *See Steel Co.,* 118 S. Ct. at 1012.

[8] *See Franklin,* 505 U.S. at 813 (Stevens, J., concurring in part) ("[T]he President has consistently and faithfully performed the ministerial duty [of relaying the Secretary's figures to the Clerk without modification]. The Court's suggestion today that the statute gives him discretion to do otherwise is plainly incorrect.").

[9] In this case, for example, although the four Justices just cited found the President to have nothing more than a ministerial responsibility with respect to the Secretary's report, a majority of the Court (including the four Justices who found standing) held that the Secretary's decision did not constitute final agency action under the APA because "[the President] is not expressly required to adhere to the policy decisions reflected in the Secretary's report. . . . [I]t is the President's personal transmittal of the report to Congress that settles the apportionment . . . ." *Franklin,* 505 U.S. at 799. The same majority noted that Congress had intended to make the reapportionment process "virtually self-executing, so that the number of Representatives per State would be determined by the Secretary of Commerce and the President without any action by Congress." *Id.* at 792.

concurred in the judgments on the narrowest grounds . . . .") (internal quotation omitted). In *Franklin*, eight Justices reached one common conclusion: that a judgment directing the Secretary of Commerce to report the population of the states in a specified way would directly affect the apportionment of the House, either because the President would voluntarily abide by it or because the President had no choice but to abide by it.

Although *Franklin* is not identical to the case before us, it is sufficiently analogous to govern our determination of plaintiffs' standing. This case involves the same apportionment statute as that at issue in *Franklin*. The Secretary of Commerce plays the same role here as the Secretary did there, and is equally amenable to suit. Here, as in *Franklin*, neither the President nor the House officials have suggested that they would refuse to follow a decision of this court (assuming, of course, that it were upheld on appeal) regarding the apportionment of congressional districts.[10] Hence, we can conclude that plaintiffs satisfy the redressability prong of the standing inquiry and, as in *Franklin*, can do so without deciding whether the President or the Clerk is subject to suit.[11]

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[10] *See* House Opp'n to Pls.' Mot. for Summ. J. at 5-6 ("Were District residents determined to have the right to elect congressional representatives, there is no doubt that the District would be included in the apportionment process.").

[11] An alternative ground for finding redressability, again without resolving the question of the President's amenability to suit, is contained in the D.C. Circuit's opinion in *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996). There, the court held that even if "the President has the power, if he so chose, to undercut . . . relief" in the form of an injunction against a subordinate official, the "partial relief [plaintiff] can obtain against subordinate executive officials is sufficient for redressability." *Id.* 980-81. This, the court said, "simply recogniz[es] that such partial relief is sufficient for standing purposes when determining whether we can order more complete (continued...)

The distinction the Executive Branch defendants draw between the two cases is not significant. They contend that unlike *Franklin*, which involved the Secretary's policy decision regarding how the census should count military personnel living abroad, here the Secretary is merely carrying out what he perceives the Constitution to require. As defendants point out, the plurality opinion in *Franklin* observed that "[t]he Secretary certainly has an interest in defending her policy determinations concerning the census" and therefore "has an interest in litigating" the accuracy of reapportionment. *Franklin,* 505 U.S. at 803 (plurality opinion of O'Connor, J.). Because in this case Secretary Daley is not defending one of his own policy decisions, defendants contend that we cannot find he has sufficient stake in the outcome of these suits.

Defendants' argument amounts to a claim that the parties lack the "concrete adverseness" necessary to assure that there is an actual "case" or "controversy" within the meaning of Article III of the Constitution. *See Gollust v. Mendell,* 501 U.S. 115, 125-26 (1991) (quoting *Baker,* 369 U.S. at 204); *Diamond v. Charles,* 476 U.S. 54, 61-62 (1986). That claim is not persuasive. Nothing in *Franklin* suggested that its standing analysis turned on the fact that the Secretary's decision was based on her view of policy rather than law. Although Secretary Daley's decision to exclude District residents is based on his interpretation of what the Constitution (and the statute that follows it verbatim) requires, his interest in and responsibility for defending that interpretation is at least as substantial as his interest in defending his policy judgments. *See* U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United

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relief would require us to delve into complicated and exceptionally difficult questions regarding the constitutional relationship between the judiciary and the executive branch." *Id.* at 981.

States and the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."). And as we have already concluded that plaintiffs have suffered constitutional "injury in fact" from the denial of their right to vote, the fact that the injury arises out of a dispute of law rather than policy does not deprive them of standing to sue.

Before concluding our standing analysis, we must also consider the fact that the *Adams* plaintiffs, unlike their *Alexander* counterparts, did not name the Secretary of Commerce as a defendant. We do not regard this as fatal to applying *Franklin* to the *Adams* complaint. In *Swan v. Clinton*, this Circuit held that, when necessary to satisfy the redressability component of standing, a court may constructively amend a complaint to include prayers for relief against unnamed defendants in their official capacities who might otherwise be in a position to frustrate the implementation of a court order. *See* 100 F.3d 973, 979-80 & n.3 (D.C. Cir. 1996) (*citing, inter alia, United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977)). Here it is not even necessary to constructively amend the complaint to bring the additional defendant before the court, because the *Alexander* plaintiffs did sue the Secretary, and we have consolidated the two cases. The Secretary is therefore already before us, and his counsel has already raised all of the appropriate arguments on his behalf.

Finally, we must address the question of whether the failure of both complaints to include Maryland election officials as defendants poses an insuperable obstacle to redressability, given that one proposed remedy is to permit plaintiffs to vote for representatives as if they were citizens of Maryland. Although there is no guarantee that Maryland officials would permit District residents to vote there even if we directed the Secretary to count them as Maryland citizens for purposes of apportionment, the fact that officials who are not parties to these cases are in a position to thwart one of many potential remedies does not defeat our jurisdiction. *See id.* at 980-81. Moreover, plaintiffs point out that if we were to

find them to be Maryland citizens for purposes of congressional voting, a remedy could be crafted that would not necessarily rely on Maryland's electoral machinery. *See Alexander* Pls.' Consolidated Mem. in Opp'n to Defs.' Mots. to Dismiss at 35 n.18 [hereinafter *Alexander* Pls.' Opp'n] (suggesting that votes of District residents be counted separately and added to Maryland totals); Tr. of Mot. Hr'g at 114-15.

In sum, we conclude that the plaintiffs in these consolidated cases have standing to raise claims challenging the constitutionality of the exclusion of the District of Columbia from the apportionment of congressional districts.[12]

IV

We now turn to the merits of plaintiffs' claims. In this Part, we consider the *Alexander* plaintiffs' contention that their right to vote in congressional elections is guaranteed by Article I of the Constitution, as well as defendants' opposing argument that the same Article precludes such a right. In Part V, we consider additional arguments, raised by both groups of plaintiffs, premised on other provisions of the Constitution.

Article I, section 2, clause 1 of the Constitution provides:

> The House of Representatives shall be composed of Members chosen every second

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[12] Because the individual plaintiffs in *Alexander* and *Adams*, all adult residents of voting age, have standing to sue, we need not consider whether plaintiff District of Columbia has standing as well. See *United States House of Representatives*, 119 S. Ct. at 773; *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (*en banc*) (citing *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.")).

> Year *by the People of the several States*, and the Electors in each *State* shall have the Qualifications requisite for Electors of the most numerous Branch of the *State* Legislature.

U.S. CONST. art. I, § 2, cl. 1 (emphasis added). Although standing alone the phrase "people of the several States" could be read as meaning all the people of the "United States" and not simply those who are citizens of individual states, the Article's subsequent and repeated references to "state[s]"—beginning with the balance of the same clause quoted above—make clear that the former was not intended. *See, e.g., id.* (electors "in each State" shall have qualifications of electors of most numerous branch "of the State Legislature"); *id.* art. I, § 2, cl. 2 (each representative shall "be an Inhabitant of that State" in which he or she is chosen); *id.* art. I, § 2, cl. 3 (representatives shall be "apportioned among the several States which may be included within this Union"); *id.* ("each State shall have at Least one Representative"); *id.* art. I, § 2, cl. 4 (the Executive Authority of the "State" shall fill vacancies); *id.* art. I, § 4, cl. 1 (the legislature of "each State" shall prescribe times, places, and manner of holding elections for representatives). Indeed, for this reason—and as the *Alexander* plaintiffs concede—residents of United States territories are not entitled to vote in federal elections, notwithstanding that they are United States citizens.[13]

Plaintiffs accordingly do not dispute that to succeed they must be able to characterize themselves as citizens of a

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[13] See *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); *Attorney Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its U.S.-Flag Islands*, U. HAW. L. REV. 445, 512 (1992); *Alexander* Pls.' Opp'n at 5-6.

"state." *See Alexander* Pls.' Opp'n at 15; accord *Adams* Pls.' Opp'n to the Federal Defs.' Mots. to Dismiss at 51 [hereinafter *Adams* Pls.' Opp'n]. Instead, they contend that District residents can fairly be characterized as citizens of a "state," as the term was intended in Article I, under either of two theories. First, they argue that the District of Columbia itself may be treated as a state through which its citizens may vote. Second, they contend that District citizens may vote in congressional elections through the State of Maryland, based on their "residual" citizenship in that state—the state from whose territory the current District was originally carved. In the following sections we consider the validity of each theory.

A

The *Alexander* plaintiffs' first theory is that "the District itself may be treated as the 'state' through which its citizens may vote" under Article I. Mem. in Supp. of Mot. of Pls. Alexander et al. for Summ. J. at 48 [hereinafter *Alexander* Pls.' Summ. J. Mem.]. As plaintiffs correctly note, the Supreme Court has on occasion interpreted the constitutional term "state" to include the District. *See Loughran v. Loughran,* 292 U.S. 216, 228 (1934) (holding that Full Faith and Credit clause binds "courts of the District . . . equally with courts of the States"); *cf. Callan v. Wilson,* 127 U.S. 540, 550 (1888) (holding that right to trial by jury extends to residents of District).[14] As they concede, however, the Court also has interpreted the term "state" to exclude the District. *See, e.g., Hepburn & Dundas v. Ellzey,* 6 U.S. (2 Cranch) 445, 452

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[14] Plaintiffs also note that Congress has passed numerous statutes that treat the District as though it were a state for various purposes. *See Alexander* Pls.' Summ. J. Mem. at 48 n.47 (citing, *inter alia*, 18 U.S.C. § 1961 (RICO Act); 50 U.S.C. § 466 (Military Selective Service Act)). But these expressions of congressional intent, most of which were passed more than a century after the ratification of the Constitution, provide little insight into the intent of the Framers.

(1805) (holding that diversity jurisdiction provision of Article III, section 2 does not cover cases in which one party is resident of District, because "the members of the American confederacy only are the states contemplated in the constitution").

The measure of "[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular . . . constitutional provision depends upon the character and aim of the specific provision involved."[15] *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973).[16] The cases plaintiffs cite do not involve Article I, nor do they involve constitutional rights that textually appear to require citizenship (or residence) in a state.[17] Defendants argue that,

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[15] We therefore reject the dissent's suggestion that if the District were not considered a state for purposes of Article I, District residents would also be deprived of the right to travel under Article IV.

[16] In *Carter*, the Court held that the District of Columbia is not a "State or Territory" within the meaning of 42 U.S.C. § 1983, but rather "is truly *sui generis* in our governmental structure." *Carter*, 409 U.S. at 432; *accord Palmore v. United States*, 411 U.S. 389, 395 (1973) ("The District of Columbia is constitutionally distinct from the States . . . .") (citing *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 445).

[17] *See, e.g., Callan*, 127 U.S. at 550 (relying on language of Article III providing that jury trial, for "crimes . . . *not committed within any State*, . . . shall be at such place or places as the legislature may direct"; and noting that Article III was specifically amended "'to provide for trial by jury of offenses committed *out of any state*'") (quoting James Madison) (emphasis added). Although in *Loughran* Justice Brandeis found the Full Faith and Credit Clause, U.S. CONST. art. IV, § 2, to bind "*courts* of the District . . . equally with courts of the States," 292 U.S. at 228 (emphasis added), in *Heald v. District of Columbia*, he made clear that "*[r]esidents* of the District lack the suffrage and have politically no voice," 259 U.S. 114, 124 (1922) (emphasis added).

by contrast, when dictating the composition of Congress, the Constitution leaves no doubt that only the residents of actual states are entitled to representation. An examination of the Constitution's language and history, and of the relevant judicial precedents, persuades us that defendants are correct and that the District-as-state theory is untenable.

1. We begin with the language of Article I, which makes clear just how deeply Congressional representation is tied to the structure of statehood. Indeed, as we explore each relevant constitutional provision, it becomes apparent how far afield from the common understandings of the relevant terms we would have to go to sustain plaintiffs' theory.

As previously noted, besides stating that the House shall be composed of members chosen by the people of the several states, clause 1 of Article I, section 2 requires that voters ("Electors") in House elections "have the Qualifications requisite for the Electors of the most numerous branch of *the State Legislature*." U.S. CONST. art. I, § 2, cl. 1 (emphasis added).[18] If the District were regarded as a state for purposes of this provision, what could the reference to "State Legislature[s]" mean? The thirteen original states all had such legislatures, as do each of the present fifty. But for most of its history, the District of Columbia has had nothing that could even roughly be characterized as a legislature for the entire District.[19] Although plaintiffs point to the existence of the

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[18] *See also* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof . . . .").

[19] For the first 70 years, there were separate local governmental structures for Washington, Georgetown, and—until the retrocession of the Virginia portion of the District in 1846—Alexandria. *See, e.g.*, An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, 2 Stat. 195, ch. 53, § 2 (1802). *See generally* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 14-29 (continued...)

current elected city council, *see Alexander* Pls.' Opp'n at 24, Congress did not pass the "home rule" statute creating that entity until 1973, and the Court of Appeals for this Circuit has indicated that such a body is not constitutionally required.[20] A right to vote that depends upon the existence of such an occasional institution can hardly have been what the Framers contemplated.

(1909). In 1871, Congress established a territorial form of government for the District, *see* An Act To Provide a Government for the District of Columbia, 16 Stat. 419, ch. 62 (1871), which was replaced by a commission system in 1874, *see* An Act for the Government of the District of Columbia, and for Other Purposes, 18 Stat. 116, ch. 337 (1874). As modified in 1878, the District's governing body was a three-person commission appointed by the President. *See id.*; An Act Providing a Permanent Form of Government for the District of Columbia, 20 Stat. 102, ch. 180 (1878). The commission system was replaced in 1967 by a mayor-commissioner and council form of government, the members of which were appointed by the President. *See* Reorganization Plan No. 3 of 1967, Pub. L. No. 90-623, 81 Stat. 948 (1967). It was not until 1973 that the present "home rule" form of government was established, creating a mayor and council elected by the citizens of the District and granting them certain executive and legislative authority; the home rule statute reserved ultimate authority over District governance to Congress. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

[20] *See Breakefield v. District of Columbia,* 442 F.2d 1227, 1229 (D.C. Cir. 1970) (noting that Circuit has rejected "the claim that . . . the members of the [then non-elected] City Council were illegally appointed 'because the citizens of the District have not been given the opportunity by popular vote to elect persons to the positions held by' them") (quoting *Carliner v. Commissioner,* 412 F.2d 1090, 1091 (D.C. Cir. 1969)); *see also D.C. Fed'n v. Volpe,* 140 U.S. App. D.C. 162, 434 F.2d 436, 443 n.28 (D.C. Cir. 1970); *Hobson v. Tobriner,* 255 F. Supp. 295 (D.D.C. 1966).

Moreover, and more important, it is clear that the ultimate legislature the Constitution envisions for the District is not a city council, but rather Congress itself. The District Clause expressly grants Congress the power to "exercise exclusive Legislation in all Cases whatsoever" over the district that would become the seat of government. U.S. CONST. art. I, § 8, cl. 17. Plaintiffs themselves argue that in the "absence" of a city council, Congress should be considered the state legislature for purposes of Article I. *See Alexander* Pls.' Opp'n at 24. But Congress cannot be characterized as a "state legislature" without doing violence to the meaning of that term. Indeed, to characterize it as such would turn the Qualifications Clause into a circle without beginning or end. Under section 2, clause 1, House voters must have the qualifications requisite for voters of the most numerous branch of the state legislature. If that legislature were Congress itself, with the House as its most numerous branch, then the clause would say no more than that voters for the House must have the qualifications requisite for voters for the House—a tautology without constitutional content.

Including the District within the definition of "state" is also inconsistent with the provisions of clause 3 of Article I, section 2, the clause that directly addresses the issue of congressional apportionment. That clause provides that "Representatives . . . shall be apportioned among *the several States which may be included within this Union*, according to their respective numbers." U.S. CONST. art. I, § 2, cl. 3 (emphasis added).[21]

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[21] Section 2 of the Fourteenth Amendment modified this provision by establishing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons *in each State* . . . ." U.S. CONST. amend. XIV, § 2 (emphasis added); see *Montana*, 503 U.S. at 445 n.1; *see also Carter*, 409 U.S. at 424 ("[T]he District of Columbia is not a 'State' within the meaning of the Fourteenth Amendment . . . .").

That provision plainly contemplates true states and not the District, which neither was one of the original states nor has been "admitted by the Congress into this Union." *Id.* art. IV, § 3, cl. 1. Indeed, the "Seat of Government" contemplated by the Constitution is subsequently described in Article I as a "District," in contrast to the "particular States" whose cessions of territory were expected to create it.[22] And, as if to remove any doubt, clause 3 goes on to identify specifically those thirteen entities it regards as the immediate post-ratification states, and to assign each an initial apportionment of representatives until an "actual Enumeration" of "each State'[s]" "respective Numbers" can be accomplished. *Id.* art. I, § 2, cl. 3.[23] The District is not included within that initial apportionment.[24]

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[22] *See* U.S. CONST. art. I, § 8, cl. 17 (granting Congress power to exercise exclusive legislation in all cases whatsoever "over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States").

[23] The clause reads:

> The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

U.S. CONST art. I, § 2, cl. 3.

[24] Plaintiffs suggest that the District may not have been included because the site of the seat of government had not yet been chosen when the Constitution was drafted, and because no one knew what its population would be. While it is true that the District did (continued...)

The effort to define the District as a state generates still further incongruities with respect to the next clause of Article I, section 2. Clause 4 provides: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." *Id.* art. I, § 2, cl. 4. But who or what is "the Executive Authority" of the District? Plaintiffs offer the current home-rule mayor as that authority, *see Alexander* Pls.' Opp'n at 24, but we again are confronted by the relative recency of that position. *See supra note* 19. And we also again have the problem that it is Congress that is the ultimate executive authority for the District. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) ("Congress' power over the District of Columbia encompasses the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative."). The possibility that the Framers intended Congress to fill its own vacancies seems far too much of a stretch, even if the constitutional fabric were more flexible than it appears to be.

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not exist at the time the Constitution was drafted, provision had been made for its creation, *see* U.S. CONST. art. I, § 8, cl. 17, and it was possible that it would be established prior to the first enumeration (*i.e.*, the first census). It is also true that the original population of the District was small. *Compare* TINDALL, *supra* note 19, at 15 (estimating 1800 population at 14,093), *with* 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 26 (bicentennial ed. 1975) (listing 1800 census count at 8,000). The Framers, however, assumed that the population would grow substantially. L'Enfant's original plan provided for a city of 800,000, which at the time was the size of Paris. *See Home Rule: Hearings Before Subcomm. No. 6 of the Comm. on the District of Columbia*, 88th Cong. 347 (1963) (statement of Robert F. Kennedy, Attorney General).

When we turn to the provisions of the Constitution that originally governed voting for the Senate, the complications of defining the District as a state become even more apparent. Although we are remanding the merits of plaintiffs' claims for Senate representation to a single-judge court, the relationship between the House and Senate provisions nonetheless requires us to examine the latter in order to determine the Framers' intentions with respect to the House.

As originally provided under Article I, section 3, the Senate was to be "composed of two Senators from each State," chosen not "by the People of the several States," as in the case of the House, but rather "*by the Legislature thereof.*" U.S. CONST. art. I, § 3, cl. 1 (emphasis added). The impossibility of treating Congress as the legislature under that clause is manifest, as doing so would mean that Congress would itself choose the District's senators. The scenario is further complicated by the fact that clause 2 of the same section provides that Senate vacancies will be filled not just by the state's "Executive," as with the House, but also by the state's "Legislature" when not in recess. *Id.* art. I, § 3, cl. 2. Since, as noted above, Congress is ultimately both the Legislature and Executive for the District, plaintiffs' theory would mean that Congress would fill vacancies in the District's Senate seats—except when Congress is in recess, in which event Congress would also fill the vacancies.

It is, of course, not surprising to conclude that the Framers did not contemplate allocating two senators to the District of Columbia. The Senate was expressly viewed as representing the states themselves, *see* THE FEDERALIST NOS. 10, 39, 58, 62 (James Madison) (Jacob E. Cooke ed., 1961), and the guarantee of two senators for each was an important element of the Great Compromise between the smaller and larger states that ensured ratification of the Constitution: the smaller states were guaranteed equal representation notwithstanding their smaller populations. *See Reynolds v. Sims,* 377 U.S. 533, 574 (1964); *Wesberry,* 376 U.S. at 12-13; *see also INS v. Chadha,* 462 U.S. 919, 950

(1983). But reaching this conclusion with respect to the Senate requires reaching a similar conclusion with respect to the House. The House provisions, after all, were "the other side of the compromise": to satisfy the larger states, the House was to be popularly elected, and "in allocating Congressmen the number assigned to *each State* should be determined solely by the number of the State's inhabitants." *Wesberry,* 376 U.S. at 13 (emphasis added). Treating the Senate and House differently with respect to the District would unhitch half that compromise from its historical and constitutional moorings.

In 1913, the Seventeenth Amendment granted the people of "each State," rather than their legislatures, the right to choose senators. U.S. CONST. amend. XVII, cl. 1. After that change, the provisions concerning qualifications and vacancies for the Senate essentially parallel those for the House. *See id.* (providing that "electors . . . shall have the qualifications requisite for electors of the most numerous branch of the State legislatures"); *id.* cl. 2 ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments . . . ."). *But see id.* cl. 1 (providing that senators shall be elected by people of "each State," rather than "of the several states" as in provision for representatives in Article I, section 2, clause 1). Accordingly, no separate discussion of those provisions is necessary.

2. We conclude from our analysis of the text that the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives. That textual evidence is supported by historical evidence concerning the general understanding at the time of the District's creation.

It is true, as plaintiffs note, that the voting rights of District residents received little express attention at the time of the Constitution's drafting. *See generally* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A*

Constitutional Analysis, 12 HARV. J. ON LEGIS. 167, 172 (1975). As plaintiffs suggest, this lack of attention may have been due to the fact that the District's geographic location had not yet been determined, and that even once selected, the territory had relatively few residents. *See supra* note 24. *But see id.* (noting that L'Enfant anticipated city of Washington growing to size of 800,000). It is also true, as our dissenting colleague argues, that the historical rationale for the District Clause—ensuring that Congress would not have to depend upon another sovereign for its protection—would not by itself require the exclusion of District residents from the congressional franchise.[25]

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[25] There is general agreement that the District Clause was adopted in response to an incident in Philadelphia in 1783, in which a crowd of disbanded Revolutionary War soldiers, angry at not having been paid, gathered to protest in front of the building in which the Continental Congress was meeting under the Articles of Confederation. *See, e.g.*, KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C. 30-34 (1991); THE FEDERALIST NO. 43, *supra*, at 289; JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION §§ 1213 (1833). Despite requests from the Congress, the Pennsylvania state government declined to call out its militia to respond to the threat, and the Congress had to adjourn abruptly to New Jersey. The episode, viewed as an affront to the weak national government, led to the widespread belief that exclusive federal control over the national capital was necessary. "Without it," Madison wrote, "not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy." THE FEDERALIST NO. 43, *supra*, at 289; *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL (continued...)

Such evidence as does exist, however, indicates a contemporary understanding that residents of the District would not have a vote in the national Congress. At the New York ratifying convention,[26] for example, Thomas Tredwell argued that "[t]he plan of the *federal city*, sir, departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS

CONVENTION AT PHILADELPHIA IN 1787, at 220 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987) ("Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? . . . . It is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.") (North Carolina ratifying convention, remarks of Mr. Iredell).

Although this self-protection rationale has little relevance for the question of congressional representation, other statements by Madison concerning the rationale for the District Clause suggest he did not view the District as the constitutional equivalent of a state. *See, e.g.,* THE FEDERALIST NO. 43, *supra*, at 289 (arguing that "the gradual accumulation of public improvements at the stationary residence of the Government, would be . . . too great a public pledge to be left in the hands of a single State"); *see also* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (Gaillard Hunt & James Brown Scott eds., 1970) (noting George Mason's objection that having national capital and a state capital at the same place would give "a provincial tincture to your national deliberations").

[26] *Cf. U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 791-92 (1995) (noting that Court has used ratification debates to confirm Framers' understanding of Article I) (citing *Powell v. McCormack,* 395 U.S. 486 (1969))

RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).[27] On the same day at that convention, Alexander Hamilton proposed that the Constitution be amended to provide: "When the Number of Persons in the District or Territory to be laid out for the Seat of the Government of the United States . . . amount to [an unspecified number] . . . Provision shall be made by Congress for having a District representation in that Body." 5 THE PAPERS OF ALEXANDER HAMILTON 189-90 (Harold C. Syrett & Jacob E. Cooke eds., 1962). The proposed amendment failed. *See id.*

Considerably more evidence of the contemporary understanding emerges from examination of the period immediately surrounding Congress' assumption of exclusive jurisdiction over the land ceded for the District by Maryland and Virginia.[28] During that period, some residents of the District sought to dissuade Congress from passing the Organic

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[27] *See also* BOWLING, *supra* note 25, at 82 (noting that opponents of Constitution charged that District residents "would be subject to a government with absolute authority over them but in which they were unrepresented").

In FEDERALIST NO. 43, Madison expressed the view that inhabitants of the District will have acquiesced in cession, "as they will have had their voice in the election of the Government which is to exercise authority over them . . . ." THE FEDERALIST NO. 43, *supra*, at 289. As plaintiffs concede, this is generally understood as a reference to the fact that before cession the residents would "have had" a voice in that decision, not a suggestion that they would have a voice in Congress thereafter. *See* Mem. Amici Curiae for Professors James D.A. Boyle *et al.* at 21 n. 13; Raven-Hansen, *supra*, at 172 n.24.

[28] *Cf. U.S. Term Limits, Inc.*, 514 U.S. at 816 (examining 1807 congressional debates as "further evidence of the general consensus" regarding meaning of Article I, section 2, clause 2).

Act of 1801, 2 Stat. 103 (1801), through which jurisdiction was to be assumed. They believed that, under the Constitution, once Congress assumed jurisdiction they would necessarily lose their vote and be "reduced to the mortifying situation, of being subject to laws made, or to be made, by we know not whom; by agents, not of our choice, in no degree responsible to us." ENQUIRIES INTO THE NECESSITY OR EXPEDIENCY OF ASSUMING EXCLUSIVE LEGISLATION OVER THE DISTRICT OF COLUMBIA 15 (1800) [hereinafter ENQUIRIES INTO THE NECESSITY] (available in Rare Book/Special Collections Reading Room, Library of Congress).[29] Members of Congress opposed to the Organic Act made the same argument. *See, e.g.*, 10 ANNALS OF CONG. 992 (1801) (remarks of Rep. Smilie) (arguing that upon assumption of congressional jurisdiction, "the people of

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[29] Paralleling our analysis in the previous section, the author of this letter to Congress wrote that "we cannot hope to have our situation ameliorated" by the Constitution for two reasons. ENQUIRIES INTO THE NECESSITY, *supra*, at 16. First, he noted:

> In the 2d Section of the 1st article, the rule of representation is settled. "The House of Representatives shall be composed of members, chosen every second year, by the people of the several states," but if we cease to be of any state, we can derive no benefit from that clause.

Id. Second, he noted that the same section also "excludes us from the privilege of voting for members of congress" because

> [T]he provision is, that 'the electors in each state shall have the qualification requisite for electors of the most numerous branch of the state legislature,' and if we are not qualified to vote for the state legislature, we are not qualified to vote for members of congress.

Id. at 18-19.

the District would be reduced to the state of subjects, and deprived of their political rights"). Even those who supported the Act appeared to agree that, under the Constitution, once Congress assumed jurisdiction the residents would automatically lose their right to vote. *See, e.g., id.* at 996 (remarks of Rep. Bird) (noting that although "the people [of the District] could not be represented in the General Government," the "blame" was not "to the men who made the act of cession; not to those who accepted it," but "to the men who framed the Constitutional provision, who peculiarly set apart this as a District under the national safeguard and Government").[30]

Others saw a constitutional amendment—rather than blocking Congress' assumption of jurisdiction—as the best way to preserve the franchise for the District's residents. *See,*

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[30] Other debates concerning the District also reflected the understanding that District residents would lack a vote in the national Congress. *See* FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER, Feb. 21, 1801, at 2 (remarks of Rep. Gallatin) ("*[T]his* was not the fault of the present congress: if any fault, it laid with the [constitutional] convention, who expressly provided that exclusive jurisdiction should be assumed, and therefore the people [of the District] could not be represented in the general government."); FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER, Feb. 26, 1801, at 2 (reporting that "Mr. Nicholson, as a representative of the state of Maryland could not avoid expressing his opinion, upon a subject so highly interesting to a party of the people of that state, who were divested, by the assumption of jurisdiction, . . . of the right of voting for . . . the house of representatives to the general government. There ought to be, in his opinion, some weighty reasons urged why they should not be possessed with other rights as great, in the election of their local legislature."); WASHINGTON FEDERALIST, Mar. 3, 1801, at 2 (reporting same statement by Rep. Nicholson) [all sources available in Newspaper and Current Periodical Reading Room, Library of Congress].

e.g., 10 ANNALS OF CONG. 998-99 (1801) (remarks of Rep. Dennis) ("[I]f it should be necessary, the Constitution might be so altered as to give them a delegate to the General Legislature, when their numbers should become sufficient."). In 1801, Augustus Woodward, a prominent lawyer who practiced in the District of Columbia, published a pamphlet decrying the area's lack of congressional representation, calling it a violation of "an original principle of republicanism, to deny that all who are governed by the laws ought to participate in the formation of them." AUGUSTUS WOODWARD, CONSIDERATIONS ON THE TERRITORY OF COLUMBIA 5-6 (1801) (available in Rare Book/Special Collections Reading Room, Library of Congress).[31] Woodward called for representation of the District in the Senate and the House, but recognized that "[i]t will require an amendment to the Constitution of the United States." *Id.* at 6. Accordingly, he proposed one. *See id.* at 15.[32]

Within a few years of the assumption of congressional jurisdiction, still others saw retrocession of the District to Maryland and Virginia as the only remedy for the "political slave[ry]" of nonrepresentation. 12 ANNALS OF CONG. 487 (1803) (remarks of Rep. Smilie); *see id.* ("Under our exercise of exclusive jurisdiction the citizens here are deprived of all

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[31] Woodward was a friend and protege of Thomas Jefferson, who appointed him judge of the Supreme Court of the Michigan Territory in 1805. *See* Richard P. Cole, *Law and Community in the New Nation: Three Visions for Michigan, 1788-1831*, 4 S. CAL. INTERDISC. L.J. 161, 196-98 (1995).

[32] In another pamphlet, written under the pseudonym Epaminondas, Woodward opposed the suggestion that "it is better for Congress never to assume the jurisdiction." 5 EPAMINONDAS ON THE GOVERNMENT OF THE TERRITORY OF COLUMBIA 9 (1801) (available in Rare Book/Special Collections Reading Room, Library of Congress). Constitutional amendment was to be preferred, he said, and was "the *exclusive* and *only* remedy." *Id.* (emphasis in original).

political rights, nor can we confer them. . . . Why not then restore the people to their former condition?"). In 1803, a bill calling for retrocession was introduced in Congress. *See id.* at 487-506. Although the bill was defeated, *see id.* at 506, the residents of the former Virginia territory eventually succeeded in obtaining retrocession in 1846, *see* An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, 9 Stat. 35 (1846).[33]

Although the foregoing represents positive evidence of a contemporary understanding that District residents would not (and did not) have the right to vote in Congress, perhaps more important is the absence of evidence to the contrary. No political leaders, for example, assured the residents that they would have representation even without constitutional amendment or defeat of the Organic Act. Nor is there any indication that the residents of the new District were surprised when they found themselves without the vote after Congress assumed exclusive jurisdiction in 1801. Indeed, had it been understood that the former citizens of Maryland and Virginia had a right to continue voting for Congress, one would have expected a flood of newspaper articles and lawsuits decrying their unlawful disenfranchisement. Such a reaction, however, is not visible in the historical record.[34]

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[33] In 1818, President Monroe, who had been a delegate to the Virginia ratifying convention, noted that the people of the District of Columbia "have no participation" in Congress' exercise of power over them, and asked Congress to consider "whether an arrangement better adapted to the principles of our Government" might be possible. 33 ANNALS OF CONG. 18 (1818). No specific arrangement was proposed. *See generally* 3 STORY, *supra* note 25, § 1218 (1833) (noting that inhabitants of the District "are not indeed citizens of any state, entitled to the privileges of such, but are citizens of the United States" and that "[t]hey have no immediate representatives in congress").

[34] *See e.g.*, COLUMBIAN MIRROR & ALEXANDRIA GAZETTE (Alexandria, Va.), Apr. 13, 1799 through Dec. 6, 1800 (continued...)

3. Finally, we note that every other court to have considered the question—whether in dictum or in holding—has concluded that residents of the District do not have the right to vote for members of Congress. The early Supreme Court decisions are particularly relevant here, not only because they are binding upon us, but because they reflect the historical understanding of Chief Justice Marshall, who "wrote from close personal knowledge of the Founders and the foundation of our constitutional structure." *National Mut. Ins.*

(further dates unavailable); FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER (Baltimore, Md.), July 1, 1800 through Dec. 31, 1801 (further dates unavailable); WASHINGTON FEDERALIST (Georgetown, D.C.), Sept. 25, 1800 through Dec. 29, 1802 [all sources available in Newspaper and Current Periodical Reading Room, Library of Congress]. To the contrary, the newspapers extensively reported the congressional debates on the Organic Act, which frequently expressed the understanding that District residents would not have a vote in Congress. *See, e.g.*, FEDERAL GAZETTE, Feb. 19, 1801, at 2 (remarks of Rep. Smilie); WASHINGTON FEDERALIST, Feb. 24, 1801, at 2 (same); *see also* FEDERAL GAZETTE, Feb. 19, 1801, at 2 (remarks of Rep. Dennis); FEDERAL GAZETTE, Feb. 21, 1801, at 2 (remarks of Rep. Gallatin); FEDERAL GAZETTE, Feb. 26, 1801, at 2 (remarks of Rep. Nicholson).

A resident of the former Virginia territory did sue for the right to vote in Virginia state elections. *See Custis v. Lane*, 17 Va. (3 Munf.) 579 (1813). The Virginia Supreme Court, however, rejected the claim on the ground that plaintiff was no longer a citizen of that state. Reflecting the same understanding as that in the congressional debates, the court held: "That he is no longer within the jurisdiction of the commonwealth of Virginia, is manifest from this consideration, that congress are vested, by the constitution, with exclusive power of legislation over the territory in question . . . ." *Id.* at 591.

Co. v. Tidewater Transfer Co., 337 U.S. 582, 587 (1949) [hereinafter *Tidewater*] (plurality opinion of Jackson, J.).

In 1805, the Chief Justice considered whether the District of Columbia was a "state" within the meaning of the Judiciary Act of 1789, which effectuated Article III's grant of diversity jurisdiction by giving circuit courts authority over cases "between a citizen of the state in which the suit is brought, and a citizen of another state." *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 452 (citing, without citation, 1 Stat. 73, 78 (1789)). Plaintiffs contended there, as they do here, that the word "state" can mean more than simply one of the members of the union. Although Marshall agreed that was true, in his view "the act of congress obviously uses the word 'state' in reference to the term used in the constitution." *Id.* Expressly relying on his understanding of the meaning of that term in the clauses that prescribe the composition of the House and the Senate, Marshall concluded that "state" could not encompass the District for purposes of Article III. "These clauses," he said, referring to the clauses of Article I, "show that the word state is used in the constitution as designating a member of the union." *Id.* at 452-53. Because the word "has been used plainly in this limited sense in the articles respecting the legislative and executive departments," he concluded, "it must be understood as retaining th[at] sense" in the article concerning the judicial branch. *Id.* at 453.

Marshall was not unaware of the unfairness his conclusion would engender. He felt constrained to reach it, however, notwithstanding that it was "extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union," should be closed to citizens of the United States who reside in the District. *Id.* at 453. Sixteen years later, Marshall reaffirmed *Hepburn & Dundas's* conclusion in *Corporation of New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91 (1816).

The dissent contends that Chief Justice Marshall's position has since been undermined by *Tidewater*, in which the Supreme Court held it constitutional for Congress to open

the federal courts to an action by a citizen of the District of Columbia against a citizen of one of the states. But in so doing, a plurality of the Court reconfirmed Marshall's conclusion that the District was not a state within the meaning of Article III's grant of jurisdiction to the federal courts, holding instead that Congress had lawfully expanded federal jurisdiction beyond the bounds of Article III by using its Article I power to legislate for the District. *See Tidewater,* 337 U.S. at 600 (plurality opinion of Jackson, J.). Although two other Justices opined that Marshall's holding in *Hepburn & Dundas* should be reversed, even they limited their disagreement to Article III's Diversity Clause, taking pains to distinguish between constitutional clauses "affecting civil rights of citizens," such as that clause, and "the purely political clauses," among which they counted "the requirements that members of the House of Representatives be chosen by the people of the several states." *Id.* at 619-623 (Rutledge, J., concurring).

In 1820, Marshall reviewed a claim that, because District residents were unrepresented in Congress, the national legislature lacked the power to impose a direct tax upon the District. *See Loughborough v. Blake,* 18 U.S. (5 Wheat.) 317 (1820). If there were a Justice who would have been particularly sensitive to this reprise of the Revolutionary War battle cry of "no taxation without representation," surely it would have been Marshall—who served as a company commander at Valley Forge. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 62-65 (1996). Nonetheless, speaking for a unanimous Court, Marshall held that Congress had the power to tax residents of the District of Columbia despite their lack of representation. *See Loughborough,* 18 U.S. (5 Wheat.) at 317. The District, he said, "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." *Id.* at 324. "Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district," he declared, "certainly the Constitution does not

consider their want of a representative in Congress as exempting it from equal taxation." *Id.* at 324-25.

The opinions do not end with those of Chief Justice Marshall. In *Heald v. District of Columbia*, Justice Brandeis also faced a claim that a congressional tax on the District was unconstitutional "because it subjects the residents of the District to taxation without representation." 259 U.S. 114, 124 (1922). Like Marshall, Brandeis recognized that "[r]esidents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation." *Id.* Nonetheless, he concluded that "[t]here is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation." *Id.*; *see also Palmore v. United States*, 411 U.S. 389 (1973) (citing, with approval, *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 445).

The cry of "no taxation without representation" has reached the courts of this circuit as well. In *Breakefield v. District of Columbia*, the Court of Appeals considered a challenge to Congress' imposition of an income tax upon District residents "notwithstanding that they then had and now have no elected representative in the Congress." 442 F.2d 1227, 1228 (D.C. Cir. 1970). Petitioner acknowledged the existence of contrary precedent, namely the Supreme Court's decisions in *Loughborough* and *Heald*, but "question[ed] both the original soundness" of those decisions "and their continuing vitality in the light of later Supreme Court pronouncements." *Id.* at 1229. "[Petitioner] presents those contentions in the wrong forum," the court said. "[I]t is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since." *Id.* at 1229-30. We are of the same view.

4. In sum, we conclude that constitutional text, history, and judicial precedent bar us from accepting plaintiffs' contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I.

Before proceeding to plaintiffs' alternative argument, we pause over another advanced by the dissent. As noted at the outset of this Part, plaintiffs do not dispute that to succeed under Article I they must be able to characterize themselves as citizens of a state. Our dissenting colleague, however, does dispute that assumption, contending that the Article's repeated use of the word "state" does not necessarily mean the Framers intended to apportion representatives *only* among states. As the dissent correctly points out, "the legal maxim *expressio unius est exclusio alterius* ('the mention of one thing implies the exclusion of another') is not always correct." *In re Sealed Case*, 181 F.3d 128, 132 (D.C. Cir. 1999) (*en banc*). And we certainly should not resolve as important a question as that now before us by rote application of such a canon of construction.

This, however, is not a case where "[t]he '*exclusio*' is . . . the result of inadvertence or accident." *Ford v. United States*, 273 U.S. 593, 612 (1927) (internal quotation omitted). As we have discussed above, the overlapping and interconnected use of the term "state" in the relevant provisions of Article I, the historical evidence of contemporary understandings, and the opinions of our judicial forebears all reinforce how deeply Congressional representation is tied to the structure of statehood.[35] The Constitution's repeated references to states cannot be understood, as the dissent urges, as merely the most practical method then available for holding elections. Rather, they are reflections of the Great Compromise forged to ensure the Constitution's ratification. There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise.

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[35] As we discuss below, this conclusion is not inconsistent with the fact that the right to vote for federal officers is a right of national citizenship. *See infra* Part V.B and note 69.

B

As an alternative to the argument that the District may be considered a state under Article I, the *Alexander* plaintiffs contend that residents of the District should be permitted to vote in congressional elections through Maryland, based on a theory of "residual" citizenship in that state. This theory depends heavily on the fact that residents of the land ceded by Maryland apparently continued to vote in Maryland elections during the period between the Act of 1790, by which Congress accepted the cession, and the Organic Act of 1801, by which Congress assumed jurisdiction and provided for the government of the District. We discuss that history and its implications below.

Although in the end we find that we cannot draw the same conclusion plaintiffs do from the historical record, we must begin by noting that there is a much greater obstacle to plaintiffs' success on this theory: it has already been rejected in a decision binding upon this court. In *Albaugh v. Tawes*, a three-judge district court considered a suit seeking a declaratory judgment "that the District of Columbia is a part of the State of Maryland for purposes of United States Senator election . . ." 233 F. Supp. 576, 576 (D. Md. 1964). Plaintiff's arguments were "based upon the fact that . . . during the period between 1790 and the 'Organic Act of 1801,' residents of the territory ceded by the State of Maryland may have been allowed to vote as residents" of that state. *Id.* at 578. The court rejected plaintiffs' claims, noting the Supreme Court's decision in *Reily v. Lamar* that former residents of Maryland lost their state citizenship upon "the separation of the District of Columbia from the State of Maryland." *Id.* (quoting *Reily v. Lamar, 6 U.S. (2 Cranch)* 344, 356-57 (1805)). *Albaugh* concluded that "residents of the District of Columbia have no right to vote in Maryland elections generally, and specifically, in the selection of United States Senators." *Id.* at 577.

The Supreme Court affirmed the decision of the three-judge court. *See Albaugh v. Tawes*, 379 U.S. 27 (1964) (per curiam). Although the Supreme Court's affirmance was

summary, the Court has reminded the lower courts that we are bound by such affirmances "until such time as the Court informs [us] that [we] are not." *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975) (quoting *Doe v. Hodgson,* 478 F.2d 537, 539 (2d Cir. 1973)). The jurisdictional statement submitted to the Supreme Court in *Albaugh* raised the principal theories we consider in this Part, and also raised the "privileges or immunities" claim considered in Part V.[36] *Cf.* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 219-20 (7th ed. 1993) (noting importance of evaluating issues raised in appeal papers); *see also Illinois State Bd. v. Socialist Workers Party,* 440 U.S. 173, 182-83 (1979); *Mandel v. Bradley,* 432 U.S. 173, 176 (1977). Accordingly, the decision in *Albaugh* forecloses the conclusion that District residents may be allowed to vote in congressional elections through the

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[36] The jurisdictional statement attacked the lower court opinion for failing to accept the significance of the fact that, through the effective date of the 1801 Organic Act, Maryland continued to designate its District lands as part of the state's federal congressional districts. *See* Jurisdictional Statement at 4-5, *Albaugh v. Tawes,* 379 U.S. 27 (1964) (No. 481) [hereinafter *Albaugh* Jurisdictional Statement]; *cf. infra* Part IV.B.2. It further argued that since "[t]he District of Columbia territory, like the rest of the State of Maryland, was a charter member of the United States," its citizens "have always been citizens of the State of Maryland and under the perpetual protection of the . . . 'equal privileges' clause." *Albaugh* Jurisdictional Statement at 7 (citing U.S. CONST. art. IV, § 2, cl. 1). This meant, plaintiff said, that the right of District citizens to vote could not constitutionally be denied. *See Id.*; *cf. infra* Part IV.B.3; *infra* Part V.B. The jurisdictional statement also raised the claim, made by *amicus* here, that the Organic Act was not intended to "repeal[] the existing Maryland Congressional election regulations which defined the District of Columbia as a part of the State of Maryland," since it provided "that the laws of the State of Maryland, as they now exist, shall be and continue in force." *Albaugh* Jurisdictional Statement at 6 (quoting 2 Stat. 103, § 1); *cf. infra* note 46.

State of Maryland. The Fourth Circuit has recently reached the same determination, in a case raising the same basic claim.[37]

Even if *Albaugh* were not an impediment, however, we would still be unable to accept the "residual" citizenship theory advanced by plaintiffs. That theory fails because the Maryland citizenship of the District's inhabitants was extinguished upon the completion of the transfer of the seat of the national government to the territory of the District. We set forth our analysis in the following subsections.

1. The District Clause gave Congress the power to exercise exclusive legislation "over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States." U.S. CONST. art. I, § 8, cl. 17. In 1788, the General Assembly of Maryland had authorized and required its representatives to cede any district in the state for the national capital; Virginia did the same.[38] After protracted debate over sites offered by several states, Congress agreed upon a tract along the Potomac River; Maryland agreed to cede land along the eastern bank while

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[37] See *Howard v. State Admin. Bd.*, 122 F.3d 1061 (4th Cir. 1997) (unpublished opinion), *aff'g* 976 F. Supp. 350 (D. Md. 1996) (holding that plaintiff's argument, that as "a resident of the District of Columbia . . . he has the right to participate in congressional elections in the State of Maryland," is "foreclosed by" *Albaugh*). The Committee for the Capital City, *amicus curiae* here, was also *amicus* in *Howard*.

[38] *See* An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of Government of the United States, 2 Kilty Laws of Md., ch. 46 (1788); *see also* An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, at 43 (Hening 1823) (enacted 1789).

Virginia agreed to cede land along the western.[39] Congress accepted the cessions by the Act of July 16, 1790, and established the first Monday of December 1800 as the date for the removal of the government to the District.[40] In 1791, Maryland ratified the cession, stating that "all that part of the said territory called Columbia which lies within the limits of this State shall be . . . forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon."[41]

Congress' acceptance of the cessions specified that the "seat of the government of the United States" would "be transferred to the district" on the "first Monday in December"

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39 *See generally* Bowling, *supra* note 25, at 127-207.

40 *See* An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790). The Act stated:

> SECTION 1. . . . That a district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby accepted for the permanent seat of the government of the United States. *Provided nevertheless*, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.
>
> . . . .
>
> SEC. 6. . . . That on the said first Monday in December, in the year one thousand eight hundred, the seat of the government of the United States shall, by virtue of this act, be transferred to the district and place aforesaid.

Id.

41 An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2. As noted above, Congress retroceded the Virginia portion of the District in 1846.

of 1800. 1 Stat. 130, § 6. Until that time, Philadelphia was to serve as the seat of government. *See id.* § 5. During that interim, the acceptance statute provided that "the operation of the laws of the state [Maryland or Virginia, respectively] within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." *Id.* § 1. Similarly, in making their cessions, both Maryland and Virginia stipulated that their jurisdiction "over the persons and property of individuals residing within the limits of the cession" would "not cease until" Congress did "by law provide for the government thereof, under their jurisdiction, in the manner provided by the [District Clause] of the Constitution." 1791 Md. Acts ch. 45, § 2; 13 Va. Stat. at Large, ch. 32, at 43. On February 27, 1801, Congress passed the so-called "Organic Act," providing for the government and the administration of justice in the District of Columbia. *See* 2 Stat. 103.

There is evidence that during the period prior to the transfer of the seat of government to the District, the residents of the area continued to vote for Congress in Maryland and Virginia. *See* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 17 (1909); Raven-Hansen, *supra*, at 173-74. When the laws of those states ceased having force in the District, however, the states ceased treating District citizens as state citizens eligible to vote in their elections—an event that occurred no later than February of 1801. *See Alexander* Am. Compl. ¶ 97; TINDALL, *supra*, at 17; Raven-Hansen, *supra*, at 174. Since that date, District residents have been unable to vote in either Maryland or Virginia.

2. The *Alexander* plaintiffs and several *amici* contend that the above-described history, and particularly the fact that residents of the area continued to vote in congressional elections into the year 1800, demonstrates that the Framers did not intend the cession of the states' lands to deprive their residents of the right to vote. As citizens of Maryland and

Virginia, plaintiffs argue, the residents of the District were originally part of the "People of the several States," continued to vote even after the land was ceded to the national government, and hence "retain a residual citizenship in the state[s] from which the District was created." *Alexander* Pls.' Opp'n at 16. This "historical experience," they contend, "confirms that otherwise stateless citizens may retain prior state affiliation for purposes of exercising their constitutional right to vote." *Alexander* Pls.' Summ. J. Mem. at 51-52.

We are unable to draw this conclusion from the history recounted above. Contrary to plaintiffs' suggestion, the fact that residents of the Virginia and Maryland lands voted in those states into 1800 did not reflect an understanding that they would continue to do so after the District became the seat of government. Rather, it reflected the fact that during this period those lands were not yet the seat of government (Philadelphia was), but instead remained part of the ceding states. As the Circuit Court for the District of Columbia held in 1801, "Virginia did not part with her jurisdiction until congress could exercise it, which, by the [District Clause of the] constitution, could not be until the district became the seat of government." *United States v. Hammond, 1 Cranch C.C.* 15, 26 F. Cas. 96, 96 (C.C.D.C. 1801). That, the court held, occurred on "the first Monday of December, 1800" by virtue of the Act of 1790. *Id.*[42] In *Reily v. Lamar*, Chief Justice Marshall reached a similar conclusion with respect to

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[42] In addition to the District Clause and the Act of 1790, the court relied on the proviso in the Virginia cession act, which stated that "the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine, until congress, having accepted the said cession, shall by law provide for the government thereof, under their jurisdiction, in manner provided by the [District Clause]." *Hammond*, 26 F. Cas. at 97 (quoting 13 Va. Stat. at Large, ch. 32, at 43); *see also* 1791 Md. Acts ch. 45, § 2 (parallel proviso in Maryland's ratification of its cession).

Maryland, although for the purposes of that case he found it "not material to inquire, whether the inhabitants of the city of Washington ceased to be citizens of Maryland on the 27th day of February 1801," when the Organic Act took effect, "or on the first Monday of December 1800." 6 U.S. (2 Cranch) 344, 357, 2 L. Ed. 300 (1805); *see also Young v. Bank of Alexandria,* 8 U.S. (4 Cranch) 384, 396, 2 L. Ed. 655 (1808) (Marshall, C.J.) ("[U]nder the terms of the cession and acceptance of the district, . . . the power of legislation remained in Virginia until it was exercised by congress."). The precise date is likewise immaterial for our purposes.[43]

In sum, during the interim period, the territory's residents continued to vote not as "residual" citizens of Maryland, but as actual citizens of that state.[44] Only thereafter did they lose their state citizenship, and with it their right to vote. *See* Raven-Hansen, *supra*, at 174 ("District residents did

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[43] The three-judge court in *Albaugh* held that "[s]ince the 'Organic Act of 1801,' it has been uniformly recognized . . . that residents of the District of Columbia are no longer citizens of the State of Maryland." 233 F. Supp. at 578.

[44] In *Hammond,* 26 F. Cas. at 99, the court held that "[b]y the constitution, congress could not exercise exclusive legislation over the district until it had become the seat of government." Even if we were to assume to the contrary that Congress acquired the authority to exercise exclusive control over the District in 1790, that would not change the analysis. Whatever Congress' *authority* may have been during the interim period, it left control of the area to Maryland and Virginia. Since 1801, however, Congress has continuously exercised exclusive authority over the District. It is thus unnecessary for us to consider whether District residents would be able to vote had Congress never exercised its authority, or had it subsequently ceded partial authority back to the state. *See* discussion of *Evans v. Cornman,* 398 U.S. 419 (1970), *infra* Part IV.B.4.

not lose state citizenship until December, 1800").[45] We thus conclude, in accord with the academic authority upon whom plaintiffs otherwise heavily rely, that this "decade of voting and representation provided no precedent for the representation of District citizens." *Id.*[46]

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[45] In 1801, Maryland law provided that "[t]he election of representatives for the state to serve in congress, shall be made by the citizens of this state, qualified to vote for members of the house of delegates." A DIGEST OF THE LAWS OF MARYLAND 227 (Herty 1799). Maryland's Constitution, in turn, imposed, *inter alia*, a 12-month residency requirement on voting for members of the House of Delegates. *See* MD. CONST. of 1776, art. II, *reproduced in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 376 (William F. Swindler ed., 1975). The current Maryland Constitution provides that only those "resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote." MD. CONST. art. I, § 1.

[46] The Committee for the Capital City, appearing as *amicus curiae*, contends that District residents retain their right to vote in Maryland because Maryland's laws were never effectively terminated in the District. *See* Br. of the Committee for the Capital City at 1-2. It notes that in accepting the ceded territory in 1790, Congress stated that "the laws of the state within such district shall not be affected . . . until Congress shall otherwise by law provide." *Id.* at 11 (quoting 1 Stat. 130, § 1). Congress never did "otherwise provide," the Committee argues, because the Organic Act of 1801 merely stated that "the laws of the state of Maryland, as they now exist, shall be and continue in force." *Id.* at 10 (quoting 2 Stat. 195, § 1). Hence, it contends, "Congress has never enacted legislation that repealed or superseded those Maryland laws, and therefore they still apply—by the express terms of the Act of 1801 establishing the District's local governance—to those persons living in that portion of the State of Maryland that was ceded to the federal government." *Id.* at 11-12.

This is simply a misinterpretation of the 1801 statute. By continuing the authority of Maryland's laws "as they now exist," Congress did nothing more than fix them (as they stood as of that (continued...)

Nor is there any other evidence of an intent, or an understanding, that former residents of Maryland and Virginia would continue to vote in those states after the District was established.[47] To the contrary, both the Maryland and Virginia statutes ratifying the cession made clear that their former territory was "forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon." 1791 Md. Acts ch. 45, § 2; *accord* 13 Va. Stat. at Large, ch. 32, at 43. The early judicial cases also made clear that "[b]y the separation of the district of

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date) as a part of the common law of the District; without such a provision the new District would have had no laws upon which to build. It did not, however, provide any continuing governmental or regulatory authority to Maryland. *See generally Brooks v. Laws,* 208 F.2d 18, 25 (D.C. Cir. 1953); *Hammond,* 26 F. Cas. at 98; *see also Reily,* 6 U.S. (2 Cranch) at 356-57. Indeed, Maryland had renounced any such authority. *See* 1791 Md. Acts ch. 45, § 2. In any event, in 1901 Congress expressly repealed the applicability to the District of acts of the Maryland Assembly, retaining only the common law and the British statutes in force in Maryland on February 27, 1801 (where consistent with provisions of the D.C. Code). *See* Act of March 3, 1901, ch. 854, 31 Stat. 1189, 1434. *See generally Brooks,* 208 F.2d at 25; *Williams v. United States,* 569 A.2d 97, 99 (D.C. 1989).

[47] One important piece of evidence of an understanding that District residents would not continue to vote in those states is contained in Article I, section 2, clause 2, which provides that no person may be a representative unless "an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2; *see also id.* art. I, § 3, cl. 3 (imposing same restriction on senators). Even if the residents of the District could be characterized as "residual citizens" of their former states, they surely are not "inhabitants" thereof. Plaintiffs' theory would make the District the only area where all of the voters are constitutionally unqualified to serve as their own representatives.

Columbia from the state of Maryland, the complainant ceased to be a citizen of that state." *Reily*, 6 U.S. (2 Cranch) at 357; *accord Hammond*, 26 F. Cas. at 98; *see also Custis v. Lane*, 17 Va. (3 Munf.) 579 (1813) (holding that District resident could no longer vote in Virginia because he was no longer "a citizen of Virginia, abiding, or inhabiting therein, but passed, with that territory, from the jurisdiction of this commonwealth, by the act of cession"). Once again, such evidence as there is indicates that the contemporary understanding was that the territory's residents would lose their vote in their former states as soon as Congress assumed exclusive jurisdiction.[48] And, after that occurred and the residents did lose their vote, altogether missing from the public record is any outpouring of complaints that the franchise was being unlawfully withheld. *See supra* note 34 and accompanying text.

3. Intertwined with plaintiffs' above argument, that the creation of the District *was not* constitutionally intended to withdraw the right to vote in Maryland, is another argument: namely, that it *could not* have had that effect. The original residents of the District were among the people of the states by virtue of their citizenship in Maryland, plaintiffs argue, and they therefore had an inalienable right to vote that could not be withdrawn. Moreover, plaintiffs contend that right continues to inhere in those who currently are residents of the District. Our dissenting colleague offers a variation on this theme. Although he concludes that District residents should be permitted to vote in the District rather than Maryland, his rationale is the same: residents of the District had the right to vote prior to 1801; this was a right they were entitled to bequeath to their "political posterity"; and this right could not

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[48] *See supra* Part IV.A.2; *see also* ENQUIRIES INTO THE NECESSITY, *supra*, at 15-16 (warning that effect of assumption of jurisdiction by Congress would be that "the Territory of Columbia [would] cease[] to be component parts of the states respectively, to which it formerly belonged," and that residents would thereby lose their "share in electing the members of congress").

be removed by Maryland's act of cession or Congress' assumption of jurisdiction.

We cannot accept the argument that current residents of the District retain residual rights because other people, living 200 years earlier in the same place, had such rights. In the United States, personal rights generally do not "run with the land." Even if it could be argued that the right to vote was a privilege that irrevocably vested from "the moment the United States Constitution was ratified" in "every citizen living in what were then the thirteen states of the union," including the portions of Maryland and Virginia that would later become the District, Br. of the Committee for the Capital City at 1, the argument would not extend to the present plaintiffs. By virtue of the passage of 200 years, all of the plaintiffs—whether by birth or a combination of birth and their ancestors' migration—arrived on the scene after the land already had become a district whose residents, by constitutional contemplation, lacked a vote in the national Congress. Whatever rights the original residents of the area may have had, none of them are alive to press them before this court.

Moreover, upon close examination, this argument is not independent of the constitutional intent argument rejected above. At bottom, plaintiffs do not argue that notwithstanding the intent of the Constitution, the right to vote could not have been taken from District residents. They do not make that argument because their ultimate appeal is to the Constitution itself: they cannot argue both that the denial of their right to vote is unconstitutional, and that it is irrelevant whether the Constitution recognizes such a right. Instead, plaintiffs argue that the Constitution gave them the right to vote upon its ratification in 1789, and that it was the Organic Act of 1801—not the Constitution—that purportedly took it away. As one group of *amici* put it, "It was . . . the exercise of federal jurisdiction over the District—and not the text or intent of the Constitution itself—that denied D.C. residents their right to

popular representation in the federal legislature." Mem. *Amici Curiae* for Professors James D.A. Boyle et al. at 16.

This, however, merely returns us to ground previously plowed. We have already concluded that it *is* the Constitution itself that is the source of plaintiffs' voting disability. Under Article I, voters for the House of Representatives must "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I. § 2, cl. 1. Because those who live in the District lack state residency, they cannot qualify to vote in Maryland's (or any other state's) elections, and hence cannot vote for its representatives in the House. *See* MD. CONST. art. I, § 1.[49] Thus, it was not the Organic Act or any other cession-related legislation that excluded District residents from the franchise, something we agree could not have been done by legislation alone. *Cf. Lucas v. Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964) (holding that "an individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate").[50] Rather, exclusion was the consequence of the completion of the cession transaction—which transformed the territory from being part

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[49] Although the Equal Protection Clause "restrains the States from fixing voter qualifications which invidiously discriminate," *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1996) (declaring Virginia poll tax unconstitutional), the Court has not questioned "the power of a State to impose reasonable residence restrictions on the availability of the ballot," *id.* at 666. *See Carrington v. Rash,* 380 U.S. 89, 96 (1965) (emphasizing that states are "free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirements of bona fide residence"); *see also Saenz v. Roe,* 526 U.S. 489 (1999) (noting that "Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence").

[50] Nor did any of those statutes purport to disenfranchise District residents: none addressed the issue of voting rights at all.

of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress' exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution. *See* U.S. CONST. art. I, § 8, cl. 17.[51]

4. We next consider an additional argument advanced in support of a right to vote in Maryland elections, this one based not only on the historical relationship between the District and Maryland, but also on the Supreme Court's ruling that residents of a federal enclave must be permitted to vote in the state from which the enclave was created. In *Evans v. Cornman*, the Supreme Court struck down under the Fourteenth Amendment's Equal Protection Clause a Maryland residency requirement that prevented persons living on the grounds of the National Institute of Health (NIH) from voting in state and federal elections. 398 U.S. 419 (1970). NIH had become a federal reservation in 1953, when Maryland ceded jurisdiction over the property to the United States. *See id.* at 420-21. Fifteen years later, the state denied NIH residents the right to vote.

The Court began its analysis by noting that:

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[51] Plaintiffs also contend that the Overseas Citizens Voting Rights Act (OCVRA) of 1975, 42 U.S.C. § 1973ff-1, by which Congress required the states to permit overseas Americans to vote absentee in the last state in which they were domiciled, shows that Americans retain a residual citizenship in their former states where necessary to vindicate the right to vote in congressional elections. See *Alexander* Pls.' Summ. J. Mem. at 51-53. Congress premised the OCVRA on a "reasonable extension of the bona fide residence concept." *Attorney Gen. of Guam*, 738 F.2d at 1019 (quoting H.R. REP. NO. 94-649, at 7 (1975)). There is a significant distinction between extending the right to vote to individuals who themselves once lived in a specific state, and extending it to other individuals who never have, based on the fact that still others were residents of Maryland 200 years ago.

> Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as state residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the NIH ceased to be a part of Maryland when the enclave was created. However, that "fiction of a state within a state" was specifically rejected by this Court in *Howard v. Commissioners of Louisville*, 344 U.S. 624, 627 (1953), and it cannot be resurrected here to deny appellees the right to vote.

Id. at 421-22. It then proceeded to consider whether the state could deny plaintiffs the vote on the ground that they were neither substantially interested in nor affected by state electoral decisions. *See id.* at 422. Maryland alleged that the plaintiffs were substantially less interested in state affairs than other Maryland residents because, under the Enclaves Clause, U.S. CONST. art. I, § 8, cl. 17, Congress had the power to exercise exclusive jurisdiction over the NIH.

The Supreme Court rejected the state's argument, noting that "the relationship between federal enclaves and the States in which they are located" had "changed considerably" over the years. *Evans*, 398 U.S. at 423. In particular, it noted that Congress had passed a series of statutes expressly permitting states to extend many of their laws to cover enclave residents, including their criminal, tax, unemployment, and workers' compensation laws. *See id.* at 424 (citing 18 U.S.C. § 13; 4 U.S.C. §§ 104-110; 26 U.S.C. § 3305(d); and 40 U.S.C. § 490). Moreover, it noted that plaintiffs were "required to register their automobiles in Maryland and obtain drivers' permits and license plates from the State; they are subject to the process and jurisdiction of State courts; they themselves can resort to those courts in divorce and child adoption proceedings; and they send their children to Maryland public schools." *Id.* All of this led the Court to conclude that

> In their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as are their neighbors who live off the enclave. In nearly every election, federal, state, and local, for offices from the Presidency to the school board, and on the entire variety of other ballot propositions, appellees have a stake equal to that of other Maryland residents.

Id. at 426. Accordingly, *Evans* held that NIH residents were "entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote." *Id.*

Plaintiffs here argue that since the residents of federal enclaves are entitled to vote under *Evans*, the residents of the District should be so entitled as well. There is some appeal to that argument, as Congress's authority to govern enclaves is identical to its authority over the District, and is conferred by the same clause of the Constitution. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States . . . become the Seat of the Government . . ., and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."). [52]

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[52] Although the constitutional text indicates that Congress has "like Authority" over both the District and the enclaves, the text does refer to them differently. The District is described as being created by "Cession" of particular states, a word which indicates that thereafter the District would no longer be part of those states. Enclaves, on the other hand, are areas purchased with the consent of the legislature of the state "in which the Same shall be," which may (continued...)

But the fact that Congress may have identical *authority* over both the District and the enclaves is not dispositive, because the ultimate result in *Evans* rested on the fact that Congress had not *exercised* that authority over NIH.[53] As noted above, Congress had passed statutes permitting Maryland to exercise its own authority in the enclave, and Maryland had done so extensively. It was Maryland's exercise of authority over the plaintiffs in that case—in areas as disparate as motor vehicle regulation, state court jurisdiction, and public education—that gave them "a stake equal to that of other Maryland residents." *Evans,* 398 U.S. at 426. The case before us is plainly not analogous in this respect. Congress has ceded none of its authority over the District back to Maryland, and Maryland has not purported to exercise any of its authority in the District.[54]

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explain why *Evans* viewed enclaves as remaining parts of the states from which they were created. We need not resolve the significance of this difference in constitutional language, however, because the difference in the way in which Congress has exercised its authority over enclaves and the District distinguishes this case from *Evans* in any event. *See* discussion *infra* pp. 59-60.

[53] Indeed, the three-judge district court whose decision the Supreme Court affirmed expressly distinguished that case from a hypothetical in which the federal government did assert exclusive jurisdiction over an enclave. *See Cornman v. Dawson,* 295 F. Supp. 654, 656 (D. Md. 1969). For the same reason, the fact that Maryland's initial statute ceding NIH, like the statute ceding the District, gave the federal government the ability to exercise exclusive authority over NIH is not decisive, since Congress plainly did not do so.

[54] We disagree with the dissent's suggestion that Congress' delegation of authority to the District government puts the District's situation on a par with that of the NIH enclave in Evans. In the latter circumstance, Congress delegated authority to another sovereign (Maryland), and the Court held that sovereign could not treat two (continued...)

Plaintiffs do not dispute this distinction, and as a consequence do not contend that they have a right to vote in elections for the Maryland state legislature. Instead, they argue that while the absence of the exercise of Maryland authority over District residents might mean they have an insufficient interest in elections to Maryland's own legislature, "District citizens have an equally vital stake in elections to Congress" as other Maryland residents. *Alexander* Pls.' Summ. J. Mem. at 27. Finding District residents qualified to vote for Congress but not for the Maryland legislature, however, would turn Article I on its head. As we have noted, Article I, section 2 states that "the [congressional] Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. Plaintiffs' enclave theory, by contrast, would permit residents of the District to vote in Maryland's congressional elections notwithstanding that they lack—even under an *Evans* theory—precisely those qualifications.

Finally, and most important, adopting plaintiffs' argument would require us to ignore the result in *Albaugh*, which barred District residents from voting in Maryland's elections for the United States Senate. *See* discussion *supra* pp. 43-45. We do not have the authority to do so. Although there may be tension between *Evans* and *Albaugh*,[55] it is a

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classes of residents (those within and without the enclave) differently. Here, by contrast, Congress has merely delegated some of its power to its own creature, the District government. The governmental structure through which Congress chooses to exercise its authority over the District—provided it does not delegate that authority to another sovereign—cannot be determinative of the voting rights of District residents.

[55] There appear to have been two steps to the *Evans* analysis. First, in rejecting the "fiction of a state within a state," the court rejected the suggestion that the NIH grounds ceased to be part of Maryland when the enclave was created. *See Evans*, 398 U.S. at (continued...)

tension that arises only if *Evans* is extended beyond its own holding in two ways: to a situation in which the ceding state no longer asserts any jurisdiction, and to a remedy limited to the right to vote in federal elections. *Albaugh*, on the other hand, is directly on point here without any extensions: it directly and expressly denies District residents a right to vote in Maryland's federal elections.

Plaintiffs contend that it is *Evans*, rather than *Albaugh*, that is the harbinger of the Supreme Court's future course. Whether that is true, however, is not for us to judge. As the Supreme Court has repeatedly admonished the lower courts, "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions," *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). We must apply the law as it now stands and, until the Supreme Court instructs otherwise, that law is set forth in *Albaugh*.

5. Plaintiffs rightly note that the cession of the lands of Virginia and Maryland "did not take away any of the individual constitutional rights guaranteed to District citizens." *Alexander* Pls.' Summ. J. Mem. at 46. As the Supreme Court declared in *O'Donoghue v. United States*, "[t[he mere cession

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421. The rationale for this declaration was unstated, other than by reference to the Court's prior similar statement in *Howard*. Standing alone, this declaration would appear to be in tension with the affirmance in *Albaugh*, although a difference in the constitutional language describing the District and the enclaves could explain it. *See supra* note 52. As discussed above, however, the Court did not rest its decision on this first step, but instead went on to consider whether enclave residents had a stake in the elections equal to that of other Maryland residents. *See Evans*, 398 U.S. at 426.

of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution." 289 U.S. 516, 541 (1933) (quoting *Downes v. Bidwell,* 182 U.S. 244, 260-61 (1901)).[56] Yet, as the same opinion also noted, "when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative" in the District or territories, "but whether the provision relied on is applicable." *Id.* at 542 (quoting *Downes,* 182 U.S. at 292). For the reasons set forth above, we conclude that the constitutional provisions plaintiffs rely upon here—the clauses of Article I that provide for congressional voting—are not applicable to residents of the District of Columbia.

V

In this Part, we consider plaintiffs' arguments based on provisions of the Constitution other than Article I. These include the Equal Protection, Privileges or Immunities, Due Process, and Republican Guarantee Clauses.

A

We first address the contention of the plaintiffs (and of out dissenting colleague) that the District's lack of representation in the House deprives its residents of the equal protection of the laws. *See Bolling v. Sharpe,* 347 U.S. 497, 500 (1954) (applying equal protection analysis to federal government under Fifth Amendment's Due Process Clause); *see also Buckley v. Valeo,* 424 U.S. 1, 93 (1976) ("Equal

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[56] *See O'Donoghue,* 289 U.S. at 541 (holding that judges of District of Columbia are Article III judges whose salaries cannot be decreased). *But see id.* at 539-40 ("The object of the grant of exclusive legislation over the district was, therefore, national in the highest sense, and the city organized under the grant became the city, *not of a state,* not of a district, but of a nation.") (internal quotation omitted) (emphasis added).

protection analysis in the Fifth Amendment is the same as that under the Fourteenth Amendment."). The plaintiffs allege that the lack of representation renders them unequal to the residents of the fifty states and of the federal enclaves.[57] And they further contend that because the right to vote is fundamental, such unequal treatment cannot be upheld unless it satisfies strict scrutiny—that is, unless it is "narrowly tailored to serve a compelling" government interest. *Alexander* Pls.' Summ. J. Mem. at 56 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Because there is no compelling interest in denying District residents the vote, plaintiffs contend that the denial cannot satisfy strict scrutiny and hence must fall.[58]

We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress. As the dissent argues, denial of the franchise is not necessary for the effective functioning of the seat of government.[59] The problem, however, is that strict scrutiny does not apply in this case. Although equal protection analysis scrutinizes the validity of classifications drawn by executive and legislative authorities, *see, e.g., Parham v.*

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[57] The *Adams* plaintiffs, but not the *Alexander* plaintiffs, also allege that their lack of representation renders them unequal to the residents of Alexandria County, Virginia (formerly a part of the District) as well as to the residents of the states "which started their organized political lives as territories of the United States." *Adams* Mot. for Summ. J. at 51.

[58] Plaintiffs do not, however, contend that the Equal Protection Clause bars states from imposing state residency as a qualification for voting. *See supra* note 49.

[59] As noted above, the principal rationale noted by Madison for exclusive congressional control over the District—ensuring that Congress would not have to depend upon another sovereign for its protection—does not appear to be relevant to the issue of voting rights. *See supra* note 25.

Hughes, 441 U.S. 347, 358 (1979), the classification complained of here is not the product of presidential, congressional, or state action. Instead, as we have just concluded, the voting qualification of which plaintiffs complain is one drawn by the Constitution itself. The Equal Protection Clause does not protect the right of all citizens to vote, but rather the right "of all *qualified* citizens to vote." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added). "[T]he right to vote in federal elections is conferred by Art. I, § 2, of the Constitution," *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966), and the right to equal protection cannot overcome the line explicitly drawn by that Article. For that reason, even the absence of a compelling ground for denying District citizens the right to vote cannot result in the judicial grant thereof.

This point is expressly made by the very cases plaintiffs cite in support of their equal protection argument: those establishing the doctrine of "one person, one vote." In those cases, the Supreme Court held that doctrine to require that, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *see also Gray v. Sanders*, 372 U.S. 368 (1963) (applying same principle to state elections). Plaintiffs assert that, even if Article I were intended to deprive District residents of congressional representation—a result inconsistent with the one person, one vote principle—that deprivation cannot continue in light of the expansive application of the principle in modern equal protection analysis.

But the one person, one vote cases themselves make clear that the structural provisions of the Constitution necessarily limit the principle's application in federal elections. In *Reynolds v. Sims*, for example, the Court recognized that the allocation "to each of the 50 States, regardless of population" of two senators and at least one representative was inconsistent with one person, one vote. 377 U.S. at 571-72. Nonetheless, the Court said, "The system

of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land." *Id.* at 574. Moreover, and particularly relevant here, the Court declared that "[t]he developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller states on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation." *Id.* This, the Court said, rendered the composition of the House and Senate constitutionally compelled, and thus "inapposite and irrelevant to state legislative districting schemes." *Id.* at 573.

In *Gray v. Sanders*, the Court had previously reached the same conclusion regarding the electoral college system used in presidential elections, which does not allocate voting strength in strict proportion to population, but which is nonetheless mandated by Article II, section 1 and the Twelfth Amendment. *See* 372 U.S. at 378.[60] And subsequently, in *Department of Commerce v. Montana,* 503 U.S. 442 (1992), the Court noted two additional (and one of the same) limitations upon the one person, one vote principle. That "general admonition," the Court said, "is constrained by three requirements. The number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and the district boundaries may not cross state lines." *Id.* at 447-48,[61] *see also Wisconsin v. City of New*

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[60] "The inclusion of the electoral college in the Constitution, as the result of specific historical concerns," the Court said, "validated the collegiate principle despite its inherent numerical inequality . . . ." *Gray,* 372 U.S. at 378.

[61] The Court noted that "[t]he first and second requirements are set forth explicitly in Article I, § 2, of the Constitution," and that "[t]he requirement that districts not cross state borders appears to be implicit in the text and has been recognized by continuous historical practice." *Montana,* 503 U.S. at 448 n.14.

York, 517 U.S. 1, 14-15 (1996) ("[T]he Constitution itself, by guaranteeing a minimum of one representative for each State, made it virtually impossible in interstate apportionment to achieve the [one person, one vote] standard imposed by *Wesberry*.").

In sum, notwithstanding the force of the one person, one vote principle in our constitutional jurisprudence, that doctrine cannot serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress. *See Breakefield v. District of Columbia*, 442 F.2d 1227, 1228 & n.4 (D.C. Cir. 1970) (rejecting contention that lack of representation rendered congressional tax on District unlawful under "one-man one-vote" decision in *Wesberry*). This analysis also forecloses plaintiffs' contention that the disparity between their treatment and that of enclave residents violates equal protection.[62] As we held in Part IV.A, the inability of District residents to vote is a consequence of Article I. Similarly, as we discussed in Part IV.B.4, the contrasting ability of enclave residents to vote is not the consequence of legislative line drawing, but rather of the Supreme Court's decision in *Evans* that enclave residents have a constitutional right to vote—a holding we are unable to extend to District

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[62] The dissent contends that the Equal Protection Clause is also violated by the disparity in treatment between District residents and overseas voters. As discussed *supra* note 51, in the Overseas Citizens Voting Rights Act (OCVRA), 42 U.S.C. § 1973ff-1, Congress required the states to permit Americans living overseas to vote absentee in the last state in which they were domiciled. Although the constitutionality of the OCVRA has not been tested, it depends upon the validity of Congress' premise that the Act is a "reasonable extension of the bona fide residence concept" for individuals who once lived in a specific state. *Attorney Gen. of Guam*, 738 F.2d at 1019 (quoting H.R. REP. No. 94-649, at 7 (1975)). The instant lawsuits, brought on behalf of all District residents regardless whether they have ever lived in a state, cannot rely on such a premise.

residents both because of distinctions between the manner in which Congress has exercised its authority over the enclaves and the District, and because of the Supreme Court's decision in *Albaugh*. *See* discussion *supra* Part IV.B.4. Hence, the differing treatment is the consequence not of legislative determinations but of constitutional distinctions. This court is without authority to scrutinize those distinctions to determine whether they are irrational, compelling, or anything in between.[63]

B

Plaintiffs also contend that the right to vote for members of Congress is a privilege of national citizenship. Although the Fourteenth Amendment's Privileges or Immunities Clause[64] is phrased as a protection of such

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[63] One of the claims in the *Adams* complaint does challenge a species of legislative action: Congress' continued exercise of exclusive federal authority over the District—or at least over the private residential portions of the District outside of the National Capital Service Area (the part of the District containing the principal federal buildings and offices). The *Adams* plaintiffs contend that Congress' decision to exercise exclusive authority over the District in local matters, yet to cede similar authority to the states in the federal enclaves, violates equal protection. This claim, however, challenges Congress' continuing authority over the District *regardless* of whether District residents may vote for Congress. *See Adams* Pls.' Opp'n at 72 n.41 (stating that even if District residents had representatives in Congress, Congress' exercise of authority over local District matters would be unconstitutional as long as representatives from places other than District are members of that body). It thus does not come within our jurisdictional mandate to decide apportionment challenges, and we therefore remand it to the single-judge district court. *See* discussion *supra* Part II.

[64] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

privileges against abridgement by the states,[65] plaintiffs further contend that its protections "are incorporated against the federal government by the fifth amendment in the same fashion as are the principles of equal protection." *Alexander* Pls.' Opp'n at 11 (citing *Bolling*, 347 U.S. at 500).[66] The denial of District residents' right to vote, plaintiffs conclude, abridges this right of national citizenship in violation of the Constitution.

We do not disagree that the "right to vote for national officers" is a "right[] and privilege[] of national citizenship." *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884)); *accord In re Quarles*, 158 U.S. 532, 535 (1895). Nor do we dispute Justice Kennedy's statements, in a concurrence repeatedly cited by plaintiffs, that this right arises out of the "relationship between the people of the Nation and their National Government, with which the States may not interfere." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845 (1995) (Kennedy, J., concurring); *see id.* at 844 ("[T]he federal right to vote . . . do[es] not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States.").[67] Indeed, as we noted above, it is Article I,

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[65] Plaintiffs do not rely on the "Privileges and Immunities" Clause of Article IV. *See* U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

[66] Although the House defendants dispute this proposition, *see* House Opp'n to Pls.' Mot. for Summ. J. at 34, our disposition of plaintiffs' claim makes it unnecessary to decide the issue.

[67] *See also U.S. Term Limits, Inc.*, 514 U.S. at 805 (noting that "'[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states,'" in fact it "was a new right, arising from the Constitution itself") (quoting *United States v. Classic*, 313 U.S. 299, 314-15 (1941)); 514 U.S. at 820-21 (noting "that the right to choose representatives belongs not to the States, but to the people").

section 2 that confers "the right to vote in federal elections." *Harper*, 383 U.S. at 665; *accord U.S. v. Classic*, 313 U.S. 299, 314-15 (1941). That, however, can hardly be the end of the inquiry, as even plaintiffs concede that residents of the territories do not have the right to vote in congressional elections, notwithstanding that they, too, are national (American) citizens. *Cf. Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994); *Attorney Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984).[68]

Rather, it is precisely because it is Article I that confers the federal right to vote that we must look to that Article to provide its content and define its boundaries. Article I grants

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[68] While our dissenting colleague does not dispute the national citizenship of territorial residents, he does distinguish them from District residents on two grounds. First, he argues that the territories were never part of the "several States," and hence that their current residents are not the political posterity of individuals who at one time were "people of the several States." Whether or not this distinction is constitutionally significant, a point addressed *supra* Part IV.B, it proceeds from the premise that it is Article I (from which the quoted phrases are taken) that gives content to the "national" right to vote. But Article I, as we explain below, is precisely what withholds that right from District residents. The dissent also contends that the territories may be distinguished from the District on the ground that they were expected eventually to become states, thus rendering their condition temporary. Although it may be possible to distinguish the territories in this way, the Supreme Court relied on just that distinction to hold that although territorial residents came within the protection of (the then-existing version of) 42 U.S.C. § 1983, District residents did not. *See District of Columbia v. Carter*, 409 U.S. 418, 431-32 (1973) ("[I]n light of the transitory nature of the territorial condition, Congress could reasonably treat the Territories as inchoate States, quite similar in many respects to the States themselves, to whose status they would inevitably ascend. The District of Columbia, on the other hand, is an exceptional community . . . established under the Constitution as the seat of the National Government.") (internal quotation omitted).

that right only to those who "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1.[69] Furthermore, it apportions representatives only "among the several States which may be included within this Union." *Id.* art. I, § 2, cl. 3. Thus, in Justice Kennedy's own words, the "Constitution uses state boundaries to fix the size of congressional delegations." *U.S. Term Limits, Inc.*, 514 U.S. at 841 (Kennedy, J., concurring).[70] Because we have previously concluded that the District cannot be characterized as a state for these purposes, and because therefore the constitutional provision that creates the federal right to vote does not include District residents within its terms, denial of the vote to those residents does not abridge their national privileges or immunities.

In further support of the privileges or immunities argument, plaintiffs reason by analogy to the arguments that prevailed in *U.S. Term Limits, Inc.* In that case, the Supreme Court struck down an Arkansas law that limited the state's congressional representatives to a fixed number of terms. In so

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[69] This does not, as both Justice Kennedy's concurrence and prior opinions of the Court make clear, mean that "electors for members of Congress owe their right to vote to the State law." *U.S. Term Limits, Inc.*, 514 U.S. at 842 (Kennedy, J., concurring) (quoting *Ex parte Yarbrough*, 110 U.S. at 663-64). Rather, "even though the Constitution uses the qualifications for voters of the most numerous branch of the States' own legislatures to set the qualifications of federal electors, Art. I, § 2, cl. 1, when these electors vote, we have recognized that they act in a federal capacity and exercise a federal right." *Id.* at 842. In short, the Constitution incorporates, or "adopts the qualification thus furnished as the qualification of its own electors for members of Congress." *Ex Parte Yarbrough*, 110 U.S. at 663.

[70] *See also U.S. Term Limits, Inc.*, 514 U.S. at 840 (Kennedy, J., concurring) ("[T]he Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union.").

doing, the Court relied not on the Privileges or Immunities Clause, but on the two Qualifications Clauses that set forth the qualifications for members of Congress. *See* U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.[71] Just as Arkansas "violated its citizens' privileges of national citizenship when it attempted to restrict their right to vote for the congressional representatives of their choice," plaintiffs argue, "[t]he defendants here violate the same constitutional privilege by denying the right of District residents to vote in Congressional elections." *Alexander* Pls.' Summ. J. Mem. at 41.

For two reasons, *U.S. Term Limits* has no application to the instant controversy. First, the congressional Qualifications Clauses at issue in that case are the structural opposites of the voter Qualifications Clause at issue here. The former set forth specific lists of qualifications that members of Congress must satisfy. *See supra* note 71. The Court held those lists to be exclusive, striking down Arkansas' term limits on the ground that the state was without authority to add to them. *See U.S. Term Limits, Inc.*, 514 U.S. at 806. By contrast, the voter Qualifications Clause, U.S. CONST. art. I, § 2, cl. 1, contains no such list, but rather merely incorporates the relevant state's own set of voter qualifications. *See U.S. Term Limits, Inc.*, 514 U.S. at 806 (noting "explicit[] contrast[]" between "state control over the qualifications of electors [and] the lack of state control over the qualifications of the elected").

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[71] The Qualifications Clause for the House of Representatives reads: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. The analogous clause for the Senate reads: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." *Id.* art. I., § 3, cl. 3.

Second, and more fundamentally, the denial of District residents' right to vote is not the consequence of the addition of any extra-constitutional qualification on voting, as in *U.S. Term Limits*. Rather, it is the result of applying precisely those qualifications contained in the Constitution itself. *See supra* Part IV. Accordingly, plaintiff's exclusion from the franchise violates neither the principles of *U.S. Term Limits*, nor the dictates of the Privileges or Immunities Clause.

C

Plaintiffs contend that the right to vote in congressional elections is also protected by the Due Process Clause of the Fifth Amendment, which provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Because the right to vote for one's own legislators is one of those protected liberties, plaintiffs argue, its denial violates their right to both procedural and substantive due process. *See Alexander* Pls.' Summ. J. Mem. at 27.

Like the privileges or immunities argument, this contention founders upon its underlying assumption: that District residents have a right to vote in congressional elections. As we have repeatedly stated above, the Constitution does not grant that right except to individuals who qualify under Article I—which District residents do not. Nor can the Due Process Clause, any more than the Equal Protection Clause, be used to change elements of the composition of Congress that are dictated by the Constitution itself. *Cf. Carliner v. Commissioner*, 412 F.2d 1090, 1090 (D.C. Cir. 1969) (rejecting argument that Due Process Clause rendered District's mayor-commissioner and city council unlawful "because the citizens of the District have not been given the opportunity by popular vote to elect" them).[72]

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[72] The Supreme Court has also held that the "procedural component of the Due Process Clause does not 'impose a constitutional limitation on the [legislative] power of Congress (continued...)

D

Plaintiffs' final claim is based on the Republican Guarantee Clause of Article IV, which states: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4. Although recognizing that the Clause is phrased as a guarantee to the states, plaintiffs once again contend that the "Framers cannot have intended anything less for the citizens of the federal government." *Alexander* Pls.' Summ. J. Mem. at 43. Plaintiffs argue that the guarantee of a republican form of government is incompatible with their exclusion from representation in Congress.

As the Supreme Court has noted, "[i]n most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *New York v. United States*, 505 U.S. 144, 184 (1992); *accord Baker v. Carr*, 369 U.S. 186, 218-27 (1962). But even if plaintiffs' claim is justiciable,[73] it does not present a substantial federal question.[74] While we cannot be certain precisely what the Framers thought constituted a "Republican

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. . . .'" *Atkins v. Parker*, 472 U.S. 115, 129 (1985) (quoting *Richardson v. Belcher*, 404 U.S. 78, 81 (1971)).

[73] *Cf. New York*, 505 U.S. at 185 (suggesting, without deciding, that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions").

[74] *Cf. Carliner*, 412 F.2d at 1091 (holding insubstantial the claim that then-existing city council was unlawful because not elected by District residents); *Breakefield*, 442 F.2d at 1229. *See generally Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth.*, 132 F.3d 775, 781 (D.C. Cir. 1998) (holding that "Congress' authorization to the Control Board to reduce, even drastically, the powers of the [elected] Board of Education does not raise an independent constitutional issue").

Form of Government," we do know that they intended the District to be subject to the exclusive control of Congress, *see* U.S. CONST. art. I, § 8, cl. 17; that they reserved the power to elect congressional representatives exclusively to those qualified to vote in state elections, *see id.* art. I, § 2, cl. 1; and that District residents are not so qualified, *see* discussion *supra* Part IV. Accordingly, we cannot adopt plaintiffs' Republican Guarantee argument without concluding that Article IV of the Constitution was intended to repeal the provisions of Article I. That, of course, we cannot do.

E

Plaintiffs argue that, even if we cannot find that Article I guarantees their right to vote in congressional elections, we should harmonize that Article with the other provisions discussed in this Part, which, they contend, do protect such a right. We do not disagree that we should strive to read the Constitution in a way that harmonizes its various provisions. We believe, however, that we have done so in the only way the words and historical interpretation of that document permit. Although the provisions considered in this Part protect rights guaranteed by the Constitution, our reading of Article I precludes the conclusion that the right plaintiffs seek to vindicate is one of those. Because the provisions of the Constitution that set forth the composition of Congress do not contemplate representation for District residents, we conclude that the denial of representation does not deny them equal protection, abridge their privileges or immunities, deprive them of liberty without due process, or violate the guarantee of a republican form of government.

VI

As we have noted, many courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation. All, however, have

concluded that it is the Constitution and judicial precedent that create the contradiction.[75] Moreover, that precedent is of particularly strong pedigree. As Justice Jackson said in following Chief Justice Marshall's opinion that the District was not a state within the meaning of Article III:

> Among his contemporaries at least, Chief Justice Marshall was not generally censured for undue literalness in interpreting the language of the Constitution to deny federal power and he wrote from close personal knowledge of the Founders and the foundation of our constitutional structure. Nor did he underestimate the equitable claims which his decision denied to residents of the District . . . .

Tidewater, 337 U.S. at 586-87 (plurality opinion of Jackson, J.) (citing *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 453).

Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues. Accordingly, plaintiffs' motions for summary judgment are denied, and defendants'

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[75] *See* cases cited *supra* Part IV.A.3; *see also United States v. Thompson*, 452 F.2d 1333, 1341 (D.C. Cir. 1971) ("[F]or residents of the District, the right to vote in congressional elections is . . . totally denied. This regrettable situation is a product of historical and legal forces over which this court has no control."); *cf. Representation for the District of Columbia: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 95th Cong. 131 (1978) (statement of Patricia M. Wald, Assistant Attorney General) (explaining that "constitutional amendment is necessary" to provide District with voting representation because "we do not believe that the word 'state' as used in Article I can fairly be construed to include the District").

motions to dismiss are granted with respect to those claims that challenge the constitutionality of the apportionment of the House of Representatives. The remaining claims are remanded to the single district judge before whom they were originally filed.

An order accompanies this memorandum.

March 20, 2000.

s/MERRICK B. GARLAND
United States Circuit Judge

s/COLLEEN KOLLAR-KOTELLY
United States District Judge

LOIS E. ADAMS, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 98-1665
	)	
WILLIAM JEFFERSON CLINTON, *et al.*	)	
	)	
Defendants.	)	

CLIFFORD ALEXANDER, *et. al*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 98-2187
	)	
WILLIAM M. DALEY, *et al.*	)	
	)	
Defendants.	)	

JUDGMENT

For the reasons stated in the accompanying Memorandum Opinion, it is, this 20th day of March, 2000, hereby

ORDERED that the Motion by Twenty Citizens of the District of Columbia for Summary Judgment in Civ. No. 98-1665 [#94] is DENIED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that President Clinton's Motion to Dismiss in Civ. No. 98-1665 [#34] is GRANTED with respect to those

claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion to Dismiss of Defendants Robin H. Carle and Wilson Livingood in Civ. No. 98-1665 [#33] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion of Plaintiffs Alexander *et al.* for Summary Judgment in Civ. No. 98-2187 [#52] is DENIED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion to Dismiss of defendants William M. Daley and the United States in Civ. No. 98-2187 [#78] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion to Dismiss of Defendants Robin H. Carle, Wilson Livingood and James M. Eagen III in *Alexander, et al. v. Daley, et al.* in Civ. No. 98-2187 [#84] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that all remaining motions and claims be REMANDED to the single district judge to whom the cases were originally assigned.

SO ORDERED.

s/MERRICK B. GARLAND
United States Circuit Judge

s/COLLEEN KOLLAR-KOTELLY
United States District Judge

LOIS E. ADAMS, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 98-1665
	)	
WILLIAM J. CLINTON, *et al.*	)	
	)	
Defendants.	)	

CLIFFORD ALEXANDER, *et. al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 98-2187
	)	
WILLIAM M. DALEY, *et al.*	)	
	)	
Defendants.	)	

OBERDORFER, J, dissenting in part, and concurring in part:[1]

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[1] I agree with the majority that the plaintiffs have standing to pursue their claims for representation in the House of Representatives. *See* Maj. Op. Part III. I also agree that the claims against the Senate defendants and the District of Columbia Financial Responsibility and Management Assistance Authority (the Control Board) do not involve apportionment, the sole business of this three-judge court. *See* Maj. Op. Part II. Accordingly, those claims are addressed in a separate memorandum and order, also filed today. *See Adams v. Clinton,* Nos. 98-1665, 98-2187 (D.D.C. Mar. 20, 2000).

> *We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

U.S. Const. preamble.

In 1964, the Supreme Court first recognized that Article I of the Constitution requires States to honor a "one person, one vote" rule in their conduct of elections for the House of Representatives, saying that:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people *in a way* that *unnecessarily* abridges this right.

Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964) (emphasis added). More than 30 years after *Wesberry*, and more than 200 years after ratification of the Constitution, plaintiffs charge, *inter alia*, that the Secretary of Commerce is obstructing several hundred thousand American citizens—the inhabitants of the District of Columbia—from their exercise of this "precious" right, and they seek vindication of that right. An examination of the relevant facts and law yields, to me, the following conclusions:

(1) Article I, section 2, of the Constitution states, in relevant part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." U.S. Const. art. I, § 2. Section 2 of the Fourteenth Amendment, which replaced but did not materially alter part of Article I, section 2, provides, in relevant part: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." *Id.* amend. XIV.

(2) During the years between when the Constitution took effect in 1789 and the federal government's assumption of exclusive jurisdiction over the area that became the District of Columbia in 1801, inhabitants of that area were "People of the several States," who, among other things, were apportioned as mandated, U.S. Const. art. I, § 2, and were entitled to, and enjoyed, the right to vote for voting representation in the House of Representatives, either through Maryland or Virginia, *see infra* Part I.B.3.

(3) The "People of the several States" who voted between 1789 and 1801 in the part of Maryland which became the District[2] thereby secured for themselves and their political posterity a constitutionally-protected right to be included in a cohort to which a Representative in Congress is apportioned and, if otherwise eligible, to vote for voting representation in the House of Representatives.

(4) In 1791, Maryland had ratified its cession to the United States of the portion of its territory which is now the District of Columbia, specifically including "persons residing or to reside thereon," but provided that it would continue to exercise jurisdiction until "Congress shall, by law, provide for the government thereof." An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2, *reprinted in* 1 D.C. Code Ann. 34, 35 (1991).

(5) The District became the permanent Seat of Government in December 1800, *see* An Act for Establishing the Temporary and Permanent Seat of Government of the United States, 1 Stat. 130, ch. 28, § 6 (1790), and the cession was finally consummated by the Organic Act of 1801, 2 Stat. 103, ch. 15 (1801). At no time did either Maryland or the United States make any provision for either termination or continuation of the apportionment, or of the voting rights, of

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[2] In 1846, those portions of Virginia which had been ceded to the United States to form the District were retroceded to Virginia. *See infra* note 23.

the "persons" ceded by Maryland to the United States. No provision in any cession instrument purported to take away the pre-existing right of those "persons" to be apportioned and to vote for voting representation in the House of Representatives. In any event, the decisions of the Supreme Court in *O'Donoghue v. United States,* 289 U.S. 516, 540 (1933) (constitutional rights not lost at cession) and *Lucas v. Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736 (1964) (constitutional voting rights of minority not waivable by majority), establish that neither the United States, nor any of its officers, could constitutionally interfere with that right of "persons" ceded to the United States or their political posterity.

(6) Nevertheless, ever since 1801, it has been assumed by some, but never authoritatively decided, that District inhabitants have no right to apportionment and to vote for voting representation in the House of Representatives.[3] On that assumption, the Secretary of Commerce intends to follow the practice of previous Secretaries and exclude inhabitants of the District of Columbia from his report to the President by which he performs his statutory duty to apportion the population of the several States and the membership of the House of Representatives, *see* 13 U.S.C. § 141(b), thereby obstructing voting representation of District inhabitants in the House.

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[3] *See Heald v. District of Columbia,* 259 U.S. 114, 124 (1922) (dictum stating that "[r]esidents of the District lack the [right of] suffrage"); *see also Loughborough v. Blake,* 18 U.S. 317, 324 (1820) (dictum stating that inhabitants of the District are "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government . . . .") (Marshall, C.J.); *infra* Part II.B, II.C.2.c.vi; Maj. Op. at notes 29, 30, 32, 34 and accompanying text (summarizing statements of various Congressmen and commentators around time of adoption of Organic Act of 1801).

(7) *Wesberry* teaches that in such circumstances it behooves the judiciary to test thoroughly any purported necessity for such a practice and the assumptions underlying it. *Wesberry,* 376 U.S. at 17-18. As the Supreme Court subsequently declared: "that an unconstitutional action has been taken before does not render the action any less unconstitutional at a later date." *See Powell v. McCormack,* 395 U.S. 486, 546-47 (1969). After thoroughly considering the various arguments, I have found nothing that necessitates federal officials continuing the practice of obstructing the "precious" constitutional right of the inhabitants of the District of Columbia to vote for voting representation in the House of Representatives. *See Wesberry,* 376 U.S. at 17-18.

(8) In addition, the Equal Protection Clause of the Fourteenth Amendment, incorporated into the Bill of Rights' Fifth Amendment and thereby made applicable to the national government,[4] requires a declaration that inhabitants of the District of Columbia have and should henceforth enjoy the same right to apportioned representation in the House of Representatives as that enjoyed by residents of other federal enclaves,[5] former residents of States who live abroad,[6] as well as residents of States.

Accordingly, I would hold that both Article I and principles of equal protection require this Court to declare that qualified residents of the District have a constitutional right to vote for voting representation in the House of Representatives, and declare that 13 U.S.C. § 141(b), as construed and applied

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[4] *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 217-18 (1995); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe,* 347 U.S. 497, 500 (1954).

[5] *Evans v. Cornman,* 398 U.S. 419, 426 (1970).

[6] Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff.

by the Secretary of Commerce, unconstitutionally obstructs their enjoyment of that right.

I

Although the facts have been well stated by my colleagues, some repetition and addition are necessary to bring the issues into focus for purposes of this dissent.

A

Article I of the original Constitution specifies that "Representatives . . . shall be apportioned among the several States" according to an "actual Enumeration" of persons made every ten years. U.S. Const. art. I, § 2, cl. 3. The Fourteenth Amendment has superceded in part, but not substantively altered, this requirement. *Id.* amend. XIV, § 2. Section 141(b) of Title 13 of the United States Code makes the Secretary of Commerce responsible for conducting the enumeration and providing the President with a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). The statute directs the President to transmit to the Congress "a statement showing the whole number of persons in each State . . . as ascertained under . . . each . . . decennial census, and the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a). Finally, the Clerk of the House is responsible for sending the "executive of each State a certificate of the number of Representatives to which each such State is entitled." 2 U.S.C. § 2a(b).

On December 26, 1990, a predecessor of the incumbent Secretary sent to President George Bush "a statement showing the apportionment population for each State as of April 1, 1990, tabulated from the 1990 Decennial Census." Statement of Undisputed Facts of Plaintiffs *Alexander et al.* with Supporting Declarations and Exhibits, Tab. 3. The statement included a determination of "the number of Representatives to which each State is entitled." *Id.* The statement allocated to every State at least one Representative. *Id.* The statement did not report the population of the District

of Columbia,[7] include the District's population in the population of any State, or include its population in the total population used for apportionment purposes. *Id.* Nor did it allocate Representatives to the District. *Id.* The incumbent Secretary, a defendant here, intends to follow his predecessor's practice, as evidenced by his opposition to plaintiffs' motions. There being no allocation of Representatives, no transmittal by the President to the Clerk of the House, and no certificate by the Clerk to the District, the present practice of the Secretary obstructs inhabitants of the District from exercising their constitutional right to vote for voting representation in the House of Representatives. Meanwhile, the Secretary includes in his apportionment of persons and allocates representatives to residents of federal enclaves, and Congress permits voting, even where there may be no apportionment, by persons residing overseas who formerly resided in a State.

B

Plaintiffs' claims present constitutional questions, the resolution of which requires examination of a broad sweep of political and legal history, including particularly the circumstances preceding and surrounding the adoption of the Seat of Government clause in the Constitution, the Maryland

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[7] According to the 1990 Decennial Census, the population of the District of Columbia as of April 1, 1990, was approximately 607,000. U.S. Census Bureau, The Official Statistics, Statistical Abstract of the United States (1998). As of 1990, there were three States with populations less than the District, each of which were each allocated one Representative: Alaska, population: 551,947; Vermont, population: 564,964; Wyoming, population: 455,975. *Alexander* Plaintiffs' Statement of Undisputed Facts, Tab 3. There were three States with populations under 700,000 which were also each allocated one Representative: Delaware, population: 668,696; North Dakota, population: 641,364; South Dakota, population: 699,999. *Id*

cession of territory and "persons" to the United States to form the District, the exercise by District residents of their right to vote for voting representation in Congress between 1790 and 1800, the evolution of the District of Columbia as a political entity from 1790 through the present, the favorable judicial and legislative treatment accorded similar claims by residents of federal enclaves (other than the District of Columbia) and to United States citizens residing outside the United States—all viewed in the light of the evolving applications of the post-Civil War Amendments and Acts of Congress in the latter half of the Twentieth Century with respect to voting rights.

1. The Seat of Government Clause

Before the adoption of the Constitution, there was no fixed national seat of government. Congress met in a number of locations.[8] In 1783, while Congress was meeting in Philadelphia, hundreds of angry Revolutionary War veterans surrounded the State House and demanded compensation for their services.[9] Neither the city of Philadelphia nor the State of Pennsylvania acted to protect Congress from the disturbances.[10] At the Constitutional Convention in 1787,[11]

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[8] From 1774 through the end of the Revolutionary War in 1783, Congress met in Philadelphia, Baltimore, and York, Pennsylvania. From 1783 through 1789, it met primarily in Philadelphia, but also in Princeton, New Jersey, Annapolis, Maryland, Trenton, New Jersey, and New York City. *See* Kenneth R. Bowling, The Creation of Washington, D.C. 15-19, 43-73 (1991); Walter Fairleigh Dodd, The Government of the District of Columbia 11-13 (1909); William Tindall, Origin and Government of the District of Columbia 13, 30-57 (1909).

[9] *See* Dodd, *supra* note 8, at 12-13; 2 Joseph Story, Commentaries on the Constitution § 1219 (Melville M. Bigelow, 5th ed. 1905); Bowling, *supra* note 8, at 29-34.

[10] *See* 2 Story, *supra* note 9, § 1219; Bowling, *supra* note 8, at 29-34; Dodd, *supra* note 8, at 13; Roy P. Franchino, *The* (continued...)

mindful of this so-called Philadelphia Mutiny, the Framers sought to ensure that the national government would be free from interference by any State government and from dependence upon any State for protection.[12] As explained by James Iredell, at North Carolina's 1789 ratifying convention:

> What would be the consequence if the seat of government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating? Do we not all remember that, in the year 1783, a band of soldiers went and insulted the Congress? The sovereignty of the United States was treated with indignity. They applied for protection to the state they resided in, but could obtain none. It is to be hoped such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.

Constitutionality of Home Rule and National Representation for the District of Columbia, 46 Georgetown L.J. 207, 209 (1957-58).

[11] On February 21, 1787, Congress had called for "a convention of delegates . . . appointed by the several states" to meet in Philadelphia to propose revisions to the 1781 Articles of Confederation. Documents Illustrative of the Formation of the Union of American States (Charles C. Tansill ed. 1927).

[12] 2 Story, *supra* note 9, § 1219; Dodd, *supra* note 8, at 19; Bowling, *supra* note 8, at 84. Some delegates also objected to the impermanency of the site of Congress' meetings. As Rufus King of Massachusetts stated, "[t]he mutability of the place had dishonored the federal [Government] and would require as strong a cure as we could devise." 3 Philip B. Kurland & Ralph Lerner, The Founders' Constitution 218 (1987); *see* Bowling, *supra* note 8, at 75-76; Dodd, *supra* note 8, at 19.

Elliot's Debates at 219-20, *reprinted in 3* Philip B. Kurland & Ralph Lerner, The Founders' Constitution 225 (1987). Similarly, James Madison, in The Federalist, published while New York was deciding on ratification, defended "the indispensable necessity of complete authority at the seat of government" on the grounds that

> [w]ithout it not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State . . . for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy.

The Federalist, No. 43, at 272 (James Madison) (Clinton Rossiter ed. 1961).

These considerations, particularly the pre-Convention experience with the shifting location of the Continental Congress and exigencies such as the Philadelphia Mutiny which provoked Congress to move from time to time, prompted the inclusion of the Seat of Government clause in Article I of the Constitution.[13] The clause provides:

> The Congress shall have the Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which

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[13] *See* 2 Story, *supra* note 9, § 1219; Franchino, *supra* note 10, at 209.

> the Same shall be, for the Erection of Forts, Arsenals, dock-Yards and other needful buildings;

U.S. Const. art. I, § 8, cl. 17. The Framers did not select a location for the Seat of Government, nor place any constraints on where that location should be, primarily to avoid offending either Philadelphia or New York, both of which might expect to be selected.[14] Instead, they left that potentially contentious decision to Congress.[15]

Neither the Seat of Government clause, nor any other provision of the Constitution, expressly mentions voting by, or representation of, inhabitants of the yet-to-be-selected Seat of Government. Indeed, the delegates to the Convention discussed and adopted the Seat of Government clause, and the remainder of the Constitution, without any recorded debate on its implications for the voting, representation or any other rights of the inhabitants of federal enclaves, including the yet-to-be-selected Seat of Government.[16]

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[14] Indeed, George Mason withdrew his proposal that would have prohibited the Seat of Government from occupying the same location as any State's seat of government, which he made because he thought that joint capitals would lead to jurisdictional disputes and lower the tone of the national legislature's deliberations, in the face of concerns that such prohibition "might make enemies of [Philadelphia and New York] which had expectations of becoming the Seat of the [General Government]." 3 Kurland & Lerner, *supra* note 12, at 218; Bowling, *supra* note 8, at 75; Dodd, *supra* note 8, at 19-20

[15] *See* Dodd, *supra* note 8, at 20.

[16] *See* Bowling, *supra* note 8, at 75. The only references to voting by the inhabitants by the yet-to-be-selected Seat of Government occurred during the ratification process. These references, by James Madison, Alexander Hamilton and Thomas Tredwell, are discussed in detail *infra* § Part II.C.2.b.

2. Cession

Between 1788 and 1801, Maryland and Virginia ceded, and the United States accepted, the area which became the Seat of Government. It is undisputed that none of the pertinent documents contain a word about the voting rights of the persons to be ceded.

On December 23, 1788, Maryland offered Congress "any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States." An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of the Government of the United States, 1788 Md. Acts ch. 46, *reprinted in* 1 D.C. Code Ann. 33-34 (1991). On December 3, 1789, Virginia similarly offered "a tract of country not exceeding ten miles square, or any lesser quantity, to be located within the limits of the State . . . as Congress may by law direct, shall be, and the same is hereby forever ceded and relinquished to the Congress and Government of the United States." 13 Va. Stat. at Large, ch. 32, *reprinted in* 1 D.C. Code Ann. 32-33 (1991). Virginia's offer contained the proviso that "the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing with the limits of the cession aforesaid, shall not cease or determine until Congress, having accepted the said cession, shall, by law, provide for the government thereof, under their jurisdiction." *Id.* Meanwhile, a number of other sites made strong bids for selection as the permanent Seat of Government.[17]

In July 1790, the first Congress of the United States, greatly influenced by President Washington, "accepted for the permanent seat of government of the United States" "a district of territory, not exceeding ten miles square," to be located within the territories offered by Maryland and Virginia. 1 Stat. 130, ch. 28, § 6. This Act also provided that Philadelphia

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[17] *See* Bowling, *supra* note 8, at 129.

would serve as the temporary seat of government until December 1, 1800, at which time the seat of government would transfer to its permanent location within the "district" accepted by the Act. *Id.* § § 5, 6. By the terms of this Act, the laws of Virginia and Maryland continued to operate within the District of Columbia "until the time fixed for the removal of the government thereto, *and* until Congress shall otherwise by law provide." *Id.* § 1 (emphasis added).

The boundaries of the permanent seat of government were fixed by Presidential proclamation of March 30, 1791. *See Morris v. United States,* 174 U.S. 196, 200 (1899). Later that year, commissioners appointed by President Washington chose the names "Washington" for the federal city and "Columbia" for the federal district.[18] There was no District of Columbia political entity created at that time, although the municipal corporations of Alexandria and Georgetown continued to exist.

On December 19, 1791, Maryland passed an act ratifying the cession. It provided that the portion of the Seat of Government "which lies within the limits of this State shall be . . . forever ceded and relinquished to the Congress and the Government of the United States, and full and absolute right and exclusive jurisdiction, *as well of soil as of persons residing or to reside thereon,*" while retaining jurisdiction over "persons and property of individuals residing within the limits" of the territory it ceded until Congress assumed jurisdiction. An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2, *reprinted in* 1 D.C. Code Ann. 34, 35 (1991) (emphasis added).

On the first Monday in December 1800, as provided by the 1790 Act, the District became the permanent Seat of Government of the United States. 1 Stat. 130, ch. 28, § 6. On February 27, 1801, Congress enacted the "Organic Act of

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[18] *See* Tindall, *supra* note 8, at 94.

1801," thereby assuming exclusive jurisdiction over the District. 2 Stat. 103, ch. 15. That Act divided the District into two counties—Washington and Alexandria; it also, *inter alia*, provided that the laws of the Maryland and Virginia would continue to apply to the respective parts of the District of Columbia which had been ceded by each state; established a federal court for the District of Columbia; established a marshal for the District; and provided that an attorney for the United States should be appointed for the District. *Id.* In 1800, the population of the ten-mile square area constituting the original Seat of Government totaled approximately 8,000, of whom approximately 6,000 were white, and approximately 2,000 were black.[19]

3. Voting in the District Between 1790 and 1800

There is undisputed historical evidence, and I would find, that from 1790 through 1800, qualified residents in what was proclaimed in 1791 to be the District continued to vote in the elections of federal officers conducted in Maryland and Virginia, including for Representatives in Congress, even though Maryland and Virginia had ceded the land to the federal government and the boundaries of the District had been drawn.[20]

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[19] U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition, Part 2, at 26 (1975).

[20] *See* Memorandum Amici Curiae at 17 (filed Feb. 26, 1999); Tindall, *supra* note 8, at 17; Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 174 (1975). In addition, there is direct evidence that residents of the District between 1790 and 1800 were eligible to vote for Congressional representatives through the ceding state. For example, Thomas Beall, a resident of Georgetown during those years, an area encompassed by the newly-drawn District boundaries, was a representative in the Maryland House of Delegates in 1800. Archive of Maryland, new series I, An Historical (continued...)

Following Congress' enactment of the Organic Act in 1801, and the assumption of exclusive jurisdiction by the United States, Maryland and Virginia no longer permitted inhabitants of the District to vote in their local, state and federal elections.[21] At that time, there was no District government or voting apparatus, and Congress made no provision for voting by inhabitants of the District. It was generally assumed that inhabitants of the District would no longer enjoy the right to vote for voting representation in the House of Representatives.[22] And, in fact, since then no inhabitant of the portion of the District ceded by Maryland has voted for voting representation in the House of Representatives.[23]

List of Public Officials of Maryland, Vol. 1, at 229 (Maryland State Archives, 1990). The Maryland Constitution then in effect required that representatives to its house of delegates be eligible to vote in the county which they represented. Maryland Constitution (1776). The United States Constitution provides that those persons eligible to vote for representatives to the "most numerous branch of the State Legislature" are also eligible to vote for the House of Representatives. U.S. Const. art. I, § 2. Accordingly, Thomas Beall, a resident of the District, was eligible to vote in Maryland's state and federal elections in 1800 (and almost surely voted for himself!). A Biographical Dictionary of the Maryland Legislature, 1635-1789, Vol. 1: A-H, at 124 (Edward C. Papnefuse, Alan F. Day, David W. Jordan, Gregory A. Stiverson eds.).

[21] Tindall, *supra* note 8, at 17; Raven-Hansen, *supra* note 20, at 174-76.

[22] *See* Maj. Op. at notes 29, 30, 32, 34 and accompanying text.

[23] On July 9, 1846, Congress authorized the retrocession to Virginia of the County of Alexandria, contingent on the assent of its residents. An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, 9 Stat. 35 (1846). In a submission to Congress, a "committee appointed by the common (continued...)

4. Evolution of a District of Columbia Voting Apparatus

In 1802, the District included five jurisdictions: the counties of Alexandria and Washington, the towns of Alexandria and Georgetown, and the City of Washington.[24] For the period from 1800 through 1871, however, there was no elected government for the District of Columbia as a whole.[25]

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council of Alexandria" described some of the motives for seeking retrocession:

> We are deprived of the elective franchise, a privilege so dear and sacred that we would present its deprivation in the strongest light before your honorable body. Side by side with trial by jury and the writ of habeas corpus may be placed the rights of the ballot box. It is not unworthy to remark that while the principles of free government are yearly extending with the rapid march of civilization, and thrones and dynasties are yielding to their influence, here alone in the 10 miles square in and about the capital of this great country is there no improvement, no advance in popular rights.

Tindall, *supra* note 8, at 110. The committee also mentioned the failure of Congress to regularly update the laws of Virginia, which, absent congressional revision, had remained in effect throughout Alexandria County in their 1801 form. *Id.* at 109-110. After the retrocession took effect, the District of Columbia consisted entirely of only the territory ceded by Maryland.

[24] *See* Dodd, *supra* note 8, at 30.

[25] As distinguished from the municipalities of Washington, Georgetown and (from 1790 to 1846) Alexandria. Congress incorporated the City of Washington in 1802, providing for a council elected annually "by the free white male inhabitants of full age, who have resided twelve months in the city, and paid taxes (continued...)

In 1871, Congress first authorized a comprehensive local government for the District, consisting of a governor appointed by the President, and a unicameral 22-member house of delegates elected by the male citizens of the District. An Act to Provide a Government for the District of Columbia, 16 Stat. 419, ch. 62 (1871). That form of representative local government was short-lived; Congress abolished it in 1874. An Act for the Government of the District of Columbia, and for Other Purposes, 18 Stat. 116, ch. 337 (1874). From 1874 until 1967, three unelected Commissioners, appointed by the President, governed the District. *Id.*; An Act Providing a Permanent Form of Government for the District of Columbia, 20 Stat. 102, ch. 180 (1878).[26] In 1967, Congress replaced the Board of Commissioners with an appointed 9-member Council and an appointed Commissioner. Reoganization Plan No. 3 of 1967, 32 F.R. 11669.

It was not until the early 1960's that the voting landscape in the District began to change. On March 29, 1961, the Twenty-third Amendment was ratified. It gave residents of the District of Columbia the right to appoint electors for the election of the President and Vice President of the United States.[27] In 1970, Congress authorized residents of the District

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therein the year preceding the election's being held." An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, 2 Stat. 195, ch. 53, § 2 (1802). The County of Washington was governed by a "levy court" the members of which were appointed by the President. *See* Dodd, *supra* note 8, at 27-38. In 1805, Congress provided Georgetown with a council elected along the lines of the City of Washington's. *Id.*

[26] *See also* Tindall, *supra* note 8, at 141; *see generally* Franchino, *supra* note 10, at 214-223.

[27] The Twenty-Third Amendment provides:

(continued...)

to elect a non-voting delegate to the House of Representatives. *See* 2 U.S.C. § 25a. As a corollary, in the wake of the Twenty-third Amendment and the 1970 provision for election of a non-voting delegate to the House, the District became equipped with a rudimentary voting system.

In 1973, Congress further relaxed its "exclusive legislation" power over the District by passage of the Home Rule Act of 1973.[28] *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). By that Act, Congress granted District citizens the right to elect a Council authorized to enact local legislation, subject to Congress' ultimate authority, provided the District with an elected Mayor, and further perfected the election apparatus earlier created to administer presidential and non-voting delegate elections. *Id.* Congress created the District government "to relieve Congress of the burden of legislating essentially local District matters." *Id.* A few years

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Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

U.S. Const. amend. XXIII.

[28] Over the years, Congress has similarly relaxed its exclusive jurisdiction in enclaves. *See infra* Part III.

earlier, the Court Reorganization Act of 1970 had created state-like courts of general jurisdiction whose appellate decisions are appealable directly to the Supreme Court by the same process that state court decisions are appealable.[29] In 1995, Congress established the Control Board, consisting of five members appointed by the President, to "eliminate budget deficits and management inefficiencies in the government of the District of Columbia." Pub. L. No. 104-8, 109 Stat. 97 (1995).

Meanwhile, the population of the District, which in 1800 had been less than one fifth of the smallest state, Delaware,[30] and less than a quarter of that contemplated by the Northwest Ordinance of 1787 for the admission of a new state,[31] had burgeoned by 1990 to over 600,000—a number more than equal to the population of several states, *see supra* note 7.

5. Evolution of Voting Rights Nationally

Paralleling the evolution of the District of Columbia and a voting apparatus therein, was the evolution of voting rights nationally, "a continuing expansion of the scope of the right of suffrage in this country." *Reynolds v. Sims,* 377 U.S.

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[29] The judges of these courts are appointed by the President, and they displace the general jurisdiction formerly exercised by the federal District Court and Court of Appeals for the District of Columbia.

[30] Delaware's population in 1800 was approximately 64,000; the District's was approximately 8,000. U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition, Part 2, at 25 (1975).

[31] The Northwest Ordinance of 1787, ratified by the First Congress in 1789, provided that new states created from the lands of the Northwest Territories needed a minimum population of 50,000 before they could be admitted to the Union. See 1 Stat. 50-52.

533, 555 (1964). Voting nationally has evolved from 18th century suffrage limited to white, property-owning, tax-paying males, over the age of 21, to the virtual universal suffrage today enjoyed by all but minors, felons, and the people of the District of Columbia. *See also* Alexander Plaintiffs Memorandum in Support of Motion for Summary Judgment, Appendix A.

II

ARTICLE I

The foregoing facts bring the following legal considerations into focus. In *Wesberry*, the Supreme Court considered whether state laws creating congressional voting districts with widely disproportionate populations violated the voting rights of inhabitants of less populous districts guaranteed to them by Article I, section 2 of the Constitution. The Court concluded that the Constitution requires that districts be apportioned so as to satisfy as nearly as possible the maxim "one person, one vote." *Wesberry,* 376 U.S. at 18. The plain statement in *Wesberry*, bears repeating:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that *unnecessarily* abridges that right.

Wesberry, 376 U.S. at 17-18 (emphasis added). For people in the District of Columbia, Congress is the ultimate "exclusive" legislature. The Secretary's continued failure to include the people of the District of Columbia in apportionment contributes to their heretofore permanent disenfranchisement in their ultimate legislature—Congress—because the place where they live, once part of the State of Maryland, is not now literally a State. Those who would interfere with the exercise of the "precious" right to vote have a heavy burden of

persuasion and proof that their interference is "necessary." To put it simply, the defendants have failed to persuade me that it is necessary for the Secretary to exclude the people of the District from apportionment and thus interfere with their voting for a Member of the House of Representatives.

A

It would seem to be axiomatic that interference with a person's "precious" right to vote for a Member of Congress, such as that exercised by District inhabitants before 1801, and protected from dilution by the *Wesberry* doctrine, violates a constitutional right. In any event, the Supreme Court long ago determined, and has often reiterated, that such a right has a firm foundation in the Constitution.

In a series of cases, beginning with *Ex parte Yarbrough (The Ku-Klux Cases),* 110 U.S. 651 (1884), the Supreme Court has held that the Constitution is the source of, and guarantees protection for, the right to vote for Members of the House of Representatives. In *Yarbrough*, the Court validated a statute making it a federal crime to interdict voting by force or intimidation because "the exercise of the right [to vote] [for minorities and for other citizens] is *guaranteed by the constitution*, and should be kept free and pure by congressional enactments whenever that is necessary." *Id.* at 665 (emphasis added). *Yarbrough* clarified the Court's earlier decision in *Minor v. Happersett,* 88 U.S. 162 (1874). In *Minor*, the Court held that the Fourteenth Amendment's privileges and immunities clause did not confer upon females a right to vote, stating that "the Constitution of the United States does not confer the right of suffrage upon any one." *Id.* at 178. The *Yarbrough* Court explained that this statement did not mean that the Constitution conferred the right to vote upon "no one," but only that it did not confer it upon anyone who happened to claim such a right. *Yarbrough,* 110 U.S. at 664. Females were not a class upon whom the Constitution conferred the right to vote because, as the *Minor* court recognized, at the time of its adoption most states did not permit females to vote and because the very text of the

Fourteenth Amendment suggested, in another context, that it contemplated only male voters.[32] *Minor,* 88 U.S. at 172-74. Of particular significance for the political posterity of the pre-1801 voters, the Minor court cautioned that "[t]he right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim the protection, he must first show that he has the right." *Minor,* 88 U.S. at 176.

Since *Yarbrough*, the Supreme Court has never wavered from its conclusion there that voting in federal elections is a constitutionally-protected right. For example, in 1941, the Court held that qualified voters have a right to participate in congressional primary elections, stating that the right to vote in congressional elections "whatever its appropriate constitutional limitations, . . . is a right established and guaranteed by the Constitution." *United States v. Classic,* 313 U.S. 299, 314, 320 (1941). In 1964, the Court started its analysis of the constitutionality of the apportionment of seats

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[32] Section 2 of the Fourteenth Amendment provides (emphasis added):

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the *male inhabitants* of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis for representation therein shall be reduced in the proportion which the number of such *male citizens* shall bear to the whole number of *male citizens* twenty-one years of age in such State.

U.S. Const. amend. XIV.

in a State legislature from the premise that "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds*, 377 U.S. at 554; *see also Wesberry*, 376 U.S. at 17. A few years later, the Court reiterated that "the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966). More recently, the Supreme Court, in concluding that States may not add to the qualifications for members of Congress that are enumerated in Article I, § § 2 and 3, observed that "[e]lecting representatives to the National Legislature was a new right, arising from the Constitution itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). Accordingly, I would conclude that the inhabitants of the District who voted for representation in the House of Representatives before 1801 were exercising a right to vote created and protected by the Constitution.

B

It is undisputed that the inhabitants of the District ceased to vote for a Member of the House of Representatives after the enactment of the Organic Act in 1801. Yet, neither the Organic Act nor any of the other statutes or instruments effecting cession purported, by their terms, to extinguish that right. The question remains whether that Act, or the cession transaction as a whole, nonetheless necessarily and otherwise lawfully terminated the pre-1801 voting rights of those persons ceded.

The defendants rely heavily upon Chief Justice Marshall's statement in *Loughborough v. Blake*, 18 U.S. 317, 324 (1820), that the inhabitants of the District were "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." However, any reliance on

Loughborough as controlling precedent is misplaced. The specific issue before the *Loughborough* Court was whether Congress had the power to impose a direct tax on residents of the District of Columbia, *id.* at 318, even though the tax apportionment clause then in effect, like the voting apportionment clause, refers by its terms only to "States," U.S. Const. art. I, § 2. The Court held that Congress' "power to lay and collect taxes," *id.* art. I, § 8, included such a power, particularly where it had the power of "exclusive legislation," and that the directive in Article I, section 2, that "taxes shall be apportioned among the several states" did not restrict those powers, *Loughborough,* 18 U.S. at 322-25. The statement that District inhabitants "voluntarily relinquished the right to representation," made in response to the argument that taxing the District violated the principle that there should be no taxation without representation, is, at best, dictum. The statement does not authoritatively establish that the District or its people waived any claim to a right to voting representation in Congress. As Chief Justice Marshall said about dicta in a related context the very next year:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. 264, 399 (1821).

Even if the *Loughborough* dictum were an authoritative conclusion of law (which it was not), it would

confirm by necessary inference the pre-1801 voting rights of the people ceded to the District; if they had no such pre-1801 rights they would have had nothing to "relinquish[]." *Loughborough,* 18 U.S. at 324. More important, the Supreme Court has since held that "[a]n individual's constitutionally protected right to case an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate." *Lucas,* 377 U.S. at 736. Although *Lucas* was a Fourteenth Amendment case, the principle it announced does not derive from the Fourteenth Amendment. Rather, the principle that voting rights are not defeasible by majority vote is intrinsic to the concept of a constitutional right. *Cf. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 19 S. Ct. 2219, 2229 (1999) ("[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights.") (quoting *Edelman v. Jordan,* 415 U.S. 651, 673 (1974)). Under the *Lucas* principle, *a fortiori*, even if Maryland's cession and the United States' acceptance ended the access of inhabitants of the ceded portion of that State to the Maryland voting apparatus, the cession could not eliminate the ongoing (albeit inchoate or dormant) constitutional right to voting representation of the District inhabitants ceded there from Maryland and their political posterity.

That pre-cession constitutional rights, absent any lawful waiver, survived the cession is confirmed by Supreme Court opinions in related contexts. In 1901, the Supreme Court addressed the question of whether the provision in Article I, section 8, of the Constitution that states that "all duties, imposts and excises shall be uniform throughout the United States" barred Congress from imposing duties on products coming from the territory of Puerto Rico into the state of New York. *Downes v. Bidwell,* 182 U.S. 244 (1901). In analyzing this question, Justice Brown, announcing the judgment of the Court, revisited the Supreme Court's decision in *Loughborough*, where the Court had held that Congress could impose a direct tax on the people of the District even though the Article I, section 2 stated that "direct Taxes shall be apportioned among the several States." *Loughborough,* 18

U.S. at 322-325. Justice Brown explained the decision in *Loughborough* as follows:

> This District had been a part of the states of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. *The Constitution had attached to it irrevocably*. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government.

Downes, 182 U.S. at 260-61 (Brown, J.) (emphasis added).

In 1933, applying the theory espoused in *Downes*, the Supreme Court addressed the question of whether the federal judges in the District were entitled to Article III protection against reduction of their compensation. *O'Donoghue,* 289 U.S. 516. The *O'Donoghue* Court concluded that the inhabitants of the District of Columbia possess "the right to

have their cases arising under the Constitution heard and determined" by a genuine Article III court. *Id.* at 540. The Court explained its decision as follows:

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, article 3. We think it is not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union.

Id.

From the foregoing, it is apparent that the cession transaction could not lawfully terminate or effectively waive the right of "persons" ceded, particularly the 1790-1800 voters, to voting representation in the House of Representatives. Nor could the cession preclude voting representation of the "persons to be" in the ceded area. The Constitution is no mere contract, subject to some kind of rule against perpetuities, between particular individuals and the national government. On the contrary, it is a covenant in perpetuity which makes the United States a fiduciary responsible for protecting for all time the rights created in and by the people who originated the Constitution for the benefit of themselves and their "Posterity." Constitution (Preamble). The people of the District of Columbia today are the political "posterity" of the People in the District who had, and exercised, a constitutional right to vote in congressional

elections from 1790 through 1800. Under established constitutional principles, neither the then-People of the District nor their Posterity forfeited that constitutional right when the District became the Seat of Government, and neither Maryland, nor the United States or its officers, had the constitutional authority to forfeit that right for them.

From another perspective, it is noteworthy that since 1820 when the *Loughborough* Court made its observation about voting by people in the District of Columbia, the voting landscape nationwide and in the District has changed dramatically, as has the District and its demographics. There is no evidence that the *Loughborough* court contemplated the time when that territory would be a body politic which was home for upwards of 500,000 people, equal to the population of at least three of the States. It is served by an elected executive authority in the form of a mayor, an elected council which is the functional equivalent of a unicameral legislature, as well as a well-tested election apparatus for voting for council members, a non-voting delegate in Congress and presidential Electors. In considering the current weight to be accorded the *Loughborough* dictum, it is to be recalled that it was also Chief Justice Marshall who wrote:

> . . . [W]e must never forget that it's a constitution we are expounding .
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> . . .
>
> [It was] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.

McCulloch v. Maryland, 17 U.S. 316, 407, 415 (1819) (Marshall, C.J.); *see also* Byron R. White, *Tribute to Honorable William J. Brennan, Jr.*, 100 Yale L.J. 1113, 1116 (1991) (Constitution is a document cast in "majestic, open-ended clauses").

C

Given that the people living in the District from 1790-1800 had and exercised a constitutionally-protected right to vote for Congressional representation, and that that right was not, and could not have been, lost or waived in 1801 when the federal government assumed exclusive jurisdiction over the District, the question remains whether, under *Wesberry*, anything else necessitates defendants' continuing to deny or interfere with the right of their political posterity to vote for voting representation in the House of Representatives. Looking at the literal text of Article I and any necessary inferences therefrom, the 23rd amendment, nonvoting by citizens in the territories, and the lapse of time since the inhabitants of the District last voted in 1800, my answer is "nothing else."

1. Plain Language

The plain language of the Constitution does not necessitate denying the people of the District the right to voting representation in Congress. Neither the Seat of Government clause nor any other provision of Article I addresses, much less directly precludes, congressional representation for the people of the District. If the Framers intended to deny voting representation in Congress to the inhabitants of the Seat of Government, the Seat of Government clause was an appropriate place to say so. It does not.

The Framers and the drafters of the Bill of Rights knew how to say "no" directly. The original constitution said "no" twenty-seven times. *See, e.g.*, U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not . . . .) (emphasis added); *see also id.* art. I, § 3, cl. 3 ("*No* Person shall be a Senator who shall not . . . .") (emphasis added); *id.* art. II, § 1, cl. 5 ("*No* Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this

Constitution, shall be eligible to the Office of President . . . .) (emphasis added).[33] Nowhere does the Seat of Government clause or any other provision of the Constitution expressly prohibit people in the District from voting for, and enjoying the service of, voting representatives in Congress.

2. Inferences from the use of the word "State"

The use of the word "State" in the various provisions of Article I concerning the election of members of the House of Representatives does not necessitate denying the people of the District the right to voting representation in Congress. The defendants maintain, in effect, that the use of the word "State" in these provisions creates a necessary inference that people not in a "State," therefore, people in the District of Columbia, cannot choose or be a Representative.[34] In essence, the

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[33] Sections 9 and 10 of Article I are a catalogue of express prohibitions. *See, e.g.*, U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall *not* be suspended . . . .") (emphasis added); *id.* art. I, § 9, cl. 3 ("*No* Bill of Attainder or ex post facto Law shall be passed.") (emphasis added); *id.* art. I., § 10, cl. 1 ("*No* State shall enter into any Treaty, Alliance, or Confederation . . . .") (emphasis added). Article III provides that "*No* Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.* art. III, § 3, cl. 1 (emphasis added). Article IV specifies that "*no* new State shall be formed or erected within the Jurisdiction of any other State; *nor* any State formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." *Id.* art. IV, § 3, cl. 1 (emphasis added). The Bill of Rights also says "no" repeatedly. *See, e.g.*, *Id.* amend. I ("Congress shall make *no* law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .") (emphasis added); *id.* amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner . . . .").

[34] The defendants rely on the following language in Article I: (1) that members of the House of Representatives are chosen by (continued...)

defendants would apply the maxim *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—as the basis for interpreting the term "State." The *expressio unius* maxim is "[a] non-binding rule of statutory interpretation, not a binding rule of law." *Martini v. Federal Nat'l Mortgage Ass'n,* 178 F.3d 1336, 1342 (D.C. Cir. 1999). As the Court of Appeals for the District of Columbia Circuit recently explained, in rejecting the application of the maxim to construe a statute,

> "[t]he maxim's force in particular situations" . . . "depends entirely on context, whether or not the draftsmen's mention of one thing . . . does really necessarily, or at least reasonably, imply the preclusion of alternatives." . . . That in turn depends on "whether, looking at the structure of the statute and perhaps its legislative history, one can be confident that a normal draftsman when he expressed 'the one thing' would have likely considered the alternatives that are arguably precluded."

Id. at 1343 (quoting *Shook v. District of Columbia Financial Responsibility and Management Assistance Auth.,* 328 U.S. App. D.C. 74, 132 F.3d 775, 782 (D.C. Cir. 1998)); *see also In*

"the People of the several States"; (2) that the "Electors in each State shall have the Qualifications requisite for Electors in the most numerous Branch of the State Legislature"; (3) that Representatives are to be "apportioned among the several States"; (4) that a Representative must "be an Inhabitant of that State in which he shall be chosen"; and (5) that the "Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § § 2, 4; Memorandum on Behalf of Secretary Daley and the United States in Opposition to Plaintiffs' Motion for Summary Judgment and in Support [of] Their Motion To Dismiss Plaintiffs' Claims at 8-10 (filed Dec. 18, 1998) ("Sec'y Opp.").

re Sealed Case, 181 F.3d 128, 132, (D.C. Cir. 1999) (*en banc*) ("The legal maxim *expressio unius est exclusio alterius* . . . is not always correct."). As the Supreme Court has explained, "The '*exclusio*' is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice." *Ford v. United States*, 273 U.S. 593, 612 (1927) (internal quotations omitted); *see also* Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. Chi. L. Rev. 83, 91 (1997) ("The underlying difficulty is that the failure to list other things may reflect simple inadvertence, a failure to consider those other things, or an inability to reach a consensus . . . .").

The Supreme Court's decisions reflect its recognition of the limited utility of the maxim; it generally chooses to justify an interpretation that would be consistent with the maxim on other or additional grounds.[35] For example, in

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[35] In this analysis of the role of the *exclusio unius* maxim to the circumstances of this case, I do not overlook the several occasions in which the Supreme Court, and the Framers themselves invoked or discussed the maxim. For example, Alexander Hamilton argued that the enumeration of certain cases over which the federal courts have jurisdiction, *see* U.S. Const. art. III, § 2, cl. 1, "marks the precise limits beyond which the federal courts cannot extend their jurisdiction," because "the specification would be nugatory if it did not exclude all ideas of more extensive authority." The Federalist No. 83, at 497 (Alexander Hamilton). He explained that "an affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended." *Id.* In *Marbury v. Madison*, Chief Justice Marshall echoed Hamilton's reasoning in concluding that Congress could not augment the original jurisdiction of the Supreme Court as described in Article III, § 2, clause 2. 5 U.S. (1 Cranch) 137, 174 (1803).

The Supreme Court has also treated the Constitution's enumeration of particular exceptions as barring the recognition of other exceptions. In *INS v. Chadha*, in considering the (continued...)

Powell, 395 U.S. 486, the House of Representatives adopted a resolution excluding Adam Clayton Powell, Jr. from membership because it found that he had wrongfully diverted House funds and made false reports on expenditures of foreign currency. These facts framed an issue of whether Congress had the power to exclude an individual elected to the House of Representatives for any reason other than those set forth in the text of the Qualifications Clause of the Constitution.[36] The Court concluded that "the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote" because the qualifications for office expressed in the Constitution were intended to be exclusive, *i.e.*, no additional qualifications could be imposed by Congress. *Id.* at

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constitutionality of the legislative veto, the Court identified four "carefully delineated exceptions from presentment and bicameralism," which generally served as prerequisites for the exercise of legislative authority. 462 U.S. 919, 956 (1983). The Court concluded that the legislative veto was unconstitutional in part because the veto "was not within any of the express constitutional exceptions authorizing one House to act alone." *Id.*

None of the foregoing applications of negative inference necessitates the use of negative inference to read Article I as denying congressional representation to the people of the District. The provisions of Article I at issue here do not fall into the category of affirmative grants of specific powers such as were discussed by Hamilton in The Federalist No. 83 or at issue in *Marbury*; nor do they involve enumerated exceptions, as in *Chada*. Moreover, unlike the provisions construed in *Marbury* and *Chada*, the defendants' proposed interpretation of Article I is not necessary to avoid an "absurd" or "nugatory" meaning.

[36] With respect to the House of Representatives, the Constitution provides: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2.

548. Although such an interpretation is consistent with the application of the *expressio unius* maxim, the Court did not mention it. Instead, the Court pointed to the Framers' concern that a future Congress might fall into the error committed by Parliament in its 18th century harassment of its non-conformist member, John Wilkes. *Id.* at 527-31. With Wilkes' experience in mind, the *Powell* Court did not rest its interpretation of the Qualifications Clause on any maxim. Instead, it relied heavily upon the "relevant historical materials" and "the basic principles of our democratic system." *Id.* at 522, 548.

Similarly, in *Term Limits,* 514 U.S. 779, the Supreme Court concluded that the Qualifications Clause barred States from imposing term limits on members of Congress. Again, although its interpretation of the clause was consistent with the application of the *expressio unius* maxim,[37] the Court based its conclusion on "the text and structure of the Constitution, the

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[37] In reaching this conclusion, I do not overlook footnote 9 in the *Term Limits* majority opinion which acknowledges that the same result could be reached through application of the maxim. However, the majority was merely responding to the dissent's argument that the application of the maxim had no place in the analysis, rejecting the argument that "it had no merit." The majority's decision, however, clearly was not controlled by the maxim, as shown by the fact that its only mention appears in a footnote. Even Justice Story, whom the *Term Limits* court cites as supporting the application of the maxim in the interpretation of the Qualifications Clause, cautioned that this maxim was "susceptible of being applied, and indeed [is] often ingeniously applied, to the subversion of the text and the objects of the instrument." 1 Joseph Story, Commentaries on the Constitution § 448, at 342 (Melville M. Bigelow, 5th ed. 1905). In his view, therefore, "[t]he truth is, that, in order to ascertain how far an affirmative or negative provision excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects, and the scope of the instrument." *Id.* at 343.

relevant historical materials, and, most importantly, the 'basic principles of our democratic system.'" *Id.* at 806 (quoting *Powell,* 395 U.S. at 548).

In light of the interpretive principles articulated and applied by *Powell* and *Term Limits*, I believe that the issue before this Court should not be resolved simply by rote application of the *expressio unius* maxim. The question remains whether other considerations justify the negative inference from the use of the term "States" proposed by the defendants. An examination of the structure and purpose of Article I, the relevant historical materials, parallel constitutional provisions, and the basic principles of our democratic system, leads me to the conclusion that none do.

a. *Structure and Purpose of Article I*

There is nothing in the use of the word "States" in the provisions of Article I pertaining to the election of members of the House of Representatives that expressly precludes recognition of a right for the inhabitants of the District to vote for voting representation in Congress. More importantly, no policy purpose would be served by adopting such an interpretation. The primary purpose of the references to "States" in Article I is apparent when one considers that it was a priority of the Framers to set up a mechanism to create a *national* form of representative government. As Justice Kennedy observed in his concurring opinion in *Term Limits*: "the Constitution takes care both to preserve the State and to *make use of their identities and structures at various points in organizing the federal union.*" *Id.* at 840 (Kennedy, J., concurring) (emphasis added). In 1787, the 13 original States were the obvious and, actually, only political subdivisions capable together of conducting national elections. Chief Justice Marshall made the point in respect to the discrete role of States and the people in the process employed to ratify the original Constitution:

> It is true, [the people] assembled in their several states -- and *where else should they*

> *have assembled*? . . . [W]hen they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

McCulloch, 17 U.S. at 403 (emphasis added). It does not denigrate the "sovereignty" of States and their other roles, internally and vis-a-vis the national government, to recognize the very significant use of their "identities and structures" in the national election process. *Term Limits*, 514 U.S. at 840. Nor does such use of them in that process necessarily impute to the Framers an intention to confer on the States anything other than an essentially ministerial role in that process. Nor does it necessarily imply an intention to exclude the people of the District from that process.

As the *Term Limits* Court further explained, "the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States." *Term Limits*, 514 U.S. at 803. With this goal in mind, the majority of the references to "States" in Article I can best be understood as specifying and using the most practical mechanisms available in the 18th century by which the people scattered among the several States could select their national representatives. *See also* The Federalist No. 61, at 372 (Alexander Hamilton) (referring to Article I as "the provisions respecting elections"). So understood, their employment in the circumstances that obtained in the late 18th century should not preclude employment by the people of the District of the election apparatus only available to them since the 1960's through which to regain representation in the House of Representatives enjoyed by their political forebears until 1801.

The requirement that a Representative be an inhabitant of the State which he or she represents, *see* U.S. Const. art. I, § 2, is the only reference to States in the context of choosing Representatives that is not related to using the States as a

mechanism for selecting Representatives. It seems obvious, however, that the primary, if not sole, purpose of that requirement was to see to it that Representatives live among the people represented. It should be obvious that this requirement was not aimed at denying the right of the people of the District to vote for voting representation in the House of Representatives. At most, it means that if the inhabitants of the District enjoyed representation by a member from the District, their Representative should reside there.

The Supreme Court's decisions in *Powell* and *Term Limits* do not undermine, indeed they tend to confirm, these interpretations. In both *Powell* and *Term Limits*, the Court was concerned with the question of whether additional qualifications beyond those expressly stated in the Qualifications Clauses of the Constitution could be imposed on a potential member of Congress. In both cases, the Court held that they could not, relying in large part on its understanding that the Framers' intent in adopting those clauses was to ensure that the opportunity to serve as a Member of the House of Representatives should be open to as many as possible. *Term Limits,* 514 U.S. at 794-95, 819; *Powell,* 395 U.S. at 547. The precise question here is not whether to impose additional qualifications, but rather how to interpret the meaning and scope of one of those qualifications. In an important sense, including the people of the District (whose political forebears were people of one of the several States) and representation for them in the House of Representatives in the apportionment process will serve a constitutional purpose honored by the *Powell* and *Term Limits* courts that "election to the National Legislature should be open to all people of merit." *Term Limits,* 514 U.S. at 819; *see also Powell,* 395 U.S. at 547.

b. *Historical Materials*

The relevant historical materials do not necessitate a conclusion that the Framers intended to deny to the inhabitants of the yet-to-be-selected Seat of Government the right to vote for voting representation in Congress through the use of the

term "States" in Article I. On the contrary, the Framers had a clear purpose in creating a national Seat of Government subject to "exclusive legislation" by Congress and fully independent of any State, *see supra* Part I.B.1, a purpose not furthered by denying its inhabitants the right to vote for voting representation in the House of Representatives. Indeed, the only recorded discussions of, or references to, voting by the inhabitants of the District appear to have occurred after the Constitutional Convention, either during the ratification debates, at the time of the passage of the Organic Act in 1801, or in later Supreme Court opinions.

(i) *Seat of Government Clause*

It is undisputed that the Framers' primary, if not only, policy purpose with respect to the Seat of Government clause, was to create a specific Seat of Government, instead of a roving one, subject to the exclusive legislative power of Congress, and free from dependence upon, and the interference from, any State. *See supra* Part I.B.1. There is no showing that adopting the negative inference proposed by the defendants and, thereby, denying the inhabitants of the District the right to vote for voting representation in the House of Representatives would further that policy purpose,[38] or that the Framers thought that it would.[39]

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[38] Indeed, the ultimate test might well be: would voting for representation in the House of Representatives interfere with the special authority of the federal government in respect to the federal enclave that is the Seat of Government. It seems obvious that a voting representative in the House of Representatives for District residents would no more "interfere[] with the jurisdiction asserted by the Federal Government," than did Kentucky's imposition of a license tax on residents of a federal enclave, approved by the Supreme Court in *Howard v. Commissioners of Sinking Fund,* 344 U.S. 624 (1953).

[39] Indeed, in other instances where the Framers were particularly concerned about the influence of States, the denial of (continued...)

(ii) *James Madison*

In The Federalist Number 43, in discussing the Seat of Government, James Madison wrote:

> as [the federal district] is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they *will have had their voice in the election of the government which is to exercise authority over them*; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated.

The Federalist No. 43, at 272-73 (James Madison) (emphasis added). It has been suggested that the "plain meaning" of

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voting representation in Congress was never part of the solution. For example, to ensure the independence of Representatives and Senators, the Constitution provides that the National Treasury, not the States, pays their salaries. U.S. Const. art. I, § 6; *Term Limits,* 514 U.S. at 809-10. Similarly, to ensure the independence of Article III Justices and judges, Article III guarantees life tenure during good behavior, and proscribes diminution of judges' compensation while in office. *See* The Federalist No. 79 (Alexander Hamilton). If the Framers thought that denial of voting representation in Congress was necessary to assure independence from the States, they should have also denied it to Representatives, Senators and, particularly, Article III judges.

Madison's statement that the inhabitants of the District "will have had their voice" is that "only the first generation of District residents will have *had* a vote with respect to their destiny." Stephen J. Markman, Statehood for the District of Columbia 39 (1988). Markman explains:

> [Madison] speaks in the future perfect tense, "they will have had their voice." If he meant that District residents would have a continuing voice in the national government, the proper language would have been "they will have their voice."

Id. However, a more plausible reading, context considered, is that Madison's statement is, at most, ambiguous on the question of District citizens' right to vote for voting representation in Congress.

Interpreting Madison's statement that the inhabitants of the Seat of Government "will have had their voice in the election of the government which is to exert authority over them" as a concession that those inhabitants would permanently lose their voice in congressional elections is in substantial tension with—in fact, seems to contradict—the natural reading of other contributions to The Federalist by Madison. A basic principle of Madison's conception of the House of Representatives was that, under the Constitution, the authority of the sitting Congress over the People derives from the most recent election and continues only until the next one. *See* The Federalist No. 52, at 330 (James Madison) ("the greater the power is, the shorter ought to be its duration"). Under Article I, the composition of the government which is to exercise authority over the District changes with each biennial federal election. If District inhabitants are unable to participate in the election of each new Congress, they have not "had a voice" in the election of their government merely because they *once* had a voice in the election of a predecessor government. Thus, Madison's statement is arguably consistent with the prospect that District inhabitants would have voted for the incumbent Congress or government and would expect

to vote every two years thereafter for each of the successor Congresses or governments.

Moreover, Madison also stated that "*every imaginable objection* seems to be obviated." The Federalist No. 43, at 273 (emphasis added). It is difficult to reconcile that statement with an interpretation that inhabitants of the District would have only one last chance to elect representatives to a single session of the House of Representatives, while new Congresses, elected every two years, would continue to exercise authority over them *ad infinitum*, without their being represented there. It is difficult to believe that Madison, his strong views about representative government and individual rights considered, could not imagine anyone objecting to such disenfranchisement. In point of fact, the District residents of the area ceded by Madison's very own Virginia objected so vigorously and so long to their lack of voting representation in Congress that they ultimately persuaded Congress to cede that area back to Virginia. *See supra* note 23. Indeed, Madison's conclusion that every objection would be obviated followed his statement that "the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting [the federal district]." Madison might well have been assuming that the Constitution required the ceding State to provide for the protection of certain rights, including the right to vote for voting representation in the House of Representatives, if not by the ceding State, then by the United States as a state-imposed condition of the cession. Of course, Maryland did no such thing, further reducing the precedential force Madison's ambiguous observation.

The substantive problems flowing from interpreting Madison as recognizing that the inhabitants of the District would be denied their right to vote for voting representation in Congress are far more troubling than any purported grammatical awkwardness which may result from a contrary interpretation. Therefore, I conclude that Madison's statement does not necessitate a conclusion that the Framers intended to deny the people of the District the right to vote for voting

representation in the House of Representatives or that the references to "States" should be interpreted to have that effect.

(iii) *Alexander Hamilton*

Alexander Hamilton, a vigorous proponent of the Constitution, unsuccessfully offered the following amendment during the New York ratifying convention:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes amount to ____ such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body.

5 The Papers of Alexander Hamilton 189-90 (Harold C. Syrett & Jacob E. Cooke eds., 1962). Although the amendment, had it been ratified, would have ensured District inhabitants the future right to vote for voting representation in Congress, it does not follow that its failure of adoption necessitates denial of that right.

So far as I have been able to determine from the parties' submissions and other research, neither the records of the New York convention nor Hamilton's papers reveal any remarks by Hamilton explaining his proposal. *See* Papers of Alexander Hamilton. One possible interpretation is that the amendment was designed to provide a formula for District representation because Article I would require such representation for the District once it was created. Another is that Hamilton believed that, absent his amendment, the District would remain part of the ceding State to the extent that its residents would vote through that State's apparatus. Also, Hamilton's proposal is consistent with the possibility that Hamilton believed that an amendment to the Constitution would be required to allow the people of the District to vote. Given the number of alternative explanations of this

amendment, all of which are speculative, I would conclude that the mere existence of this proposed amendment is not significant evidence that the Framers intended to deny the people of the District the right to vote for voting representation in Congress or that the references to "States" were intended to have that effect.

(iv) *Thomas Tredwell*

Thomas Tredwell argued in the New York ratifying convention that inhabitants of the proposed Seat of Government would not and should not be able to participate in congressional elections:

> The plan of the *federal city*, sir, departs from every principal of freedom, as far as the distance of the two polar stars from each other; for, *subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world.*

2 Elliot's Debates at 402, *reprinted in* 3 Kurland and Lerner, *supra* note 12, at 225 (emphasis added). However, Tredwell opposed not only the Seat of Government clause, but the entire Constitution. As such an opponent, his characterization of the Constitution's effect on District inhabitants is "entitled to little weight." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1976) ("Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight. This is especially so with regard to the statements of legislative opponents who in their zeal to defeat a bill understandably tend to overstate its reach.") (internal citations, ellipsis and quotation marks omitted); William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but not Statutory Legislative History?*, 66 Geo. Wash. L. Rev. 1301, 1318 (1998) ("[Opponents'] strategic statements are

worth little in understanding the provision if it is adopted, because their incentives are to exaggerate and distort the meaning and effect of the provision."). Accordingly, Tredwell's statements shed little, if any, light on the Framers' intent with respect to the voting rights of the inhabitants of the District or the interpretation of the references to "States" in Article I.

(v) *Organic Act*

There were statements made at the time of the enactment of the Organic Act in 1801 which assume that its enactment would have the effect of terminating the right of inhabitants of the District to vote for voting representation in the House of Representatives.[40] I do not consider those statements to be persuasive evidence that the Framers of the Constitution intended such a outcome to result from their use of the term "States" or from the language of any other provision in the Constitution. The Organic Act debates occurred over fourteen years after the Constitutional Convention and over ten years after the First Congress selected the location of the Seat of Government. The views of individual participants in those debates, even if they could be attributed to the Sixth Congress as a whole, would be an unreliable indication of the understanding of the Founders during the time before the location of the Seat of Government had been determined. Defendants do not suggest that those who made the statements participated in the Convention or were "au courant" in 1787. Moreover, given the modest size of the District's population in 1801, the drafters of the Organic Act might well have assumed, without knowing, that the Framers had simply not considered providing affirmatively, yet not affirmatively precluding, for voting representation for the District's relatively few inhabitants. A member of Congress and two Senators representing 8,000 souls could have very awkward and disruptive of the power balance. Had

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[40] *See* Maj. Op. at notes 29, 30, 32, 34 and accompanying text.

populous New York or Philadelphia been chosen as the permanent Seat of Government, however,—certainly a possibility in 1787, *see supra* Part I.B.1—it seems unlikely that 1801 Congressmen would have seen the denial of voting representation for the District's population as the Framers' manifest design. These facts make it, in my view, unreasonable to assume that the views expressed at the time of the adoption of the Organic Act reliably reflect any decision by the Framers, which would have necessarily been formed without knowing whether the site of the Seat of Government would be New York, Philadelphia, or some other place, urban or rural.

(iv) *Loughborough*

Finally, there is Chief Justice Marshall's 1820 statement in *Loughborough* that the inhabitants of the District were "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." 18 U.S. at 324. Defendants rely very heavily upon the *Loughborough* statement because, among other things, Chief Justice Marshall was present at the creation. As Justice Jackson put it so elegantly, the Chief Justice "wrote from close personal knowledge of the Founders and the foundation of our constitutional structure . . . ." *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 586-87 (1949). But the *Loughborough* dictum does not necessarily support defendants' persistent contention that the Constitution *ab initio* precluded voting representation in Congress for inhabitants of the Seat of Government, wherever it might ultimately be. Rather the *Loughborough* dictum can better be read to mean what it says and clearly implies: Chief Justice Marshall believed that some time after the Constitution was ratified, the "part of the society" constituting inhabitants of the District "voluntarily relinquished" voting rights that they had previously enjoyed, including specifically, apportioned rights to representation in the House of Representatives. However, the *Loughborough* dictum cannot be reconciled with the

present understanding of the nature of constitutional rights—including rights under the *original* Constitution. The parties have not cited (and my research has not disclosed) any documentary evidence that inhabitants of the District ever actually waived their voting rights individually or collectively, either before cession or after it. Finally, as previously discussed, the concept of relinquishment "by constructive consent is not a doctrine commonly associated with surrender of constitutional rights." *College Savings Bank,* 119 S. Ct. at 2229 (quoting *Edelman,* 415 U.S. at 673); *Lucas,* 377 U.S. at 736; *see supra* Part II.B. Accordingly, this dictum does not necessitate a conclusion that by using the word "States" in Article I or in drafting any other provisions of the Constitution in 1787 the Framers intended to deny to the inhabitants of the yet-to-be-selected Seat of Government the right to vote for voting representation in the House of Representatives.

c. *Parallel Constitutional Provisions*

The use of the term "State" in parallel provisions of the Constitution does not necessitate or justify the negative inference proposed by the defendants. To the contrary, as Supreme Court decisions make clear, the term "State" is not necessarily interpreted as meaning "and not the District of Columbia."

The defendants rely heavily on the Supreme Court's decision *Hepburn & Dundas v. Ellzey,* 6 U.S. 445 (1805). In *Hepburn*, the Supreme Court considered whether citizens of the District could bring suits in federal court. Section 11 of the Judiciary Act of 1789 gave federal courts jurisdiction to hear cases where "the suit is between the citizen of the State where the suit is brought, and a citizen of another State." 1 Stat. 73, 78. The Court looked to Article III of the Constitution, which confers power on the federal courts to hear suits "between Citizens of different States," to answer the question of whether the reference to "States" in the statute included the District. The *Hepburn* Court concluded that the reference to "States" in the Constitution, and therefore in the statute, did not include the District. *Id.* at 452-53. However, it did not consider

whether the reference to States in Article III *precluded* jurisdiction over suits between citizens of the District and citizens of a State.

In 1948, Congress enacted a statute that treated the District as a State so that its residents could maintain diversity suits in federal courts. 62 Stat. 869 (codified at 28 U.S.C. § 1332(d)). In 1949, the Supreme Court upheld that statute as an appropriate exercise of Congress' power under the District Clause, even though Article III, § 2, clause 1, only refers to cases "between Citizens of different States." *Tidewater,* 337 U.S. 582. There is no majority opinion. However, the *Tidewater holding* confirms what is now the law: the Constitution does not bar Congress from conferring federal diversity jurisdiction in cases brought by a District resident even though that individual is not literally a citizen of a "State." Accordingly, the use of the term "State" in the diversity jurisdiction clause of the Constitution cannot mean "and not of the District of Columbia."

Similarly, the Supreme Court has held that the Full Faith and Credit clause in Article IV of the Constitution, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," U.S. Const. art. IV, § 2, binds the courts of the District equally with the courts of the States. *Loughran v. Loughran,* 292 U.S. 216, 228 (1934).

Further, if the references to "States" in Article I § 2, necessarily exclude the people of the District, then the reference to "Citizens of each State" in Article IV, § 2, clause 1, would prohibit the enjoyment of an enforceable right to travel by District citizens. Article IV, § 2, clause 1, guarantees that "[t]he Citizens of each *State* shall be entitled to all Privileges and Immunities of Citizens in the Several States" (emphasis added). This provision of the Constitution protects a fundamental component of the right to travel, "the right of a citizen of one State . . . to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz v. Roe,* 119 S. Ct. 1518, 1525 (1999).

The privileges and immunities clause of Article IV "provides important protections for nonresidents who enter a State whether to obtain employment, to procure medical services, or even to engage in commercial shrimp fishing." *id.* at 1526 (internal citations omitted). It defies common sense to suppose that the clause implicitly requires the denial of an enforceable right to travel to citizens of the District, leaving treatment of District citizens to the exclusive discretion of each State they visit. It is only slightly less implausible to imagine that the Framers meant to leave District citizens' right to travel dependant upon the legislative grace of Congress. In any event, the implausibility of these two interpretations of the Article IV privileges and immunities clause—that it prohibits a right to travel for District citizens, or that it neither prohibits nor guarantees such a right—suggests that neither interpretation follows simply from the application of common sense to the plain language of the clause.

Accordingly, the interpretations of the term "State" in other provisions of the Constitution support a conclusion that the references to "States" in Article I do not necessarily imply "and not the District of Columbia."

d. *Democratic principles*

As reiterated by the Supreme Court in *Term Limits* and *Powell*, interpretation of the Constitution, particularly Article I, should be guided by the fundamental democratic principles upon which this nation was founded. *Powell,* 395 U.S. at 547; *Term Limits,* 514 U.S. at 819-23. Absent any persuasive evidence that the Framers' intent in using the term "State" was to deny the inhabitants of the District the right to vote for voting representation in the House of Representatives, a consideration of fundamental democratic principles further supports the conclusion that the use of that term does not necessitate that result.

A republican, that is representative, form of government, is a keystone in the Constitution's structure, a keystone hewn directly from the Declaration of Independence;

the denial of representation was one of the provocations that generated the Declaration and the War that implemented it.[41] Article I creates the republican form of the national government; Article IV guarantees that form to each state and its people.

Recent Supreme Court analysis confirms the continuing vitality of these principles. As Justice Kennedy, writing for the Court, aptly described it:

> By splitting the atom of sovereignty, the founders established two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

Alden v. Maine, 119 S. Ct. 2240, 2265 (1999) (internal quotations omitted). Thus, the people of each state are sovereign in that state; the people of the Nation are sovereign vis-a-vis the national government. As the Supreme Court has explained:

> [R]epresentatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states. . . . Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people."

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[41] For example, the Declaration stated that the King: "has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only." The Declaration of Independence ¶ 5 (U.S. 1776).

Term Limits, 514 U.S. at 803 (quoting 1 Story § 627). The Court emphasized that "the right to choose representatives belongs not to the States, but to the people. . . . Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and *chosen directly, not by the States, but by the people.*" *Term Limits,* 514 U.S. at 820-21 (emphasis added). The Court found the principle firmly grounded in Chief Justice Marshall's oft-cited observation that

> [t]he government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

Id. (quoting *McCulloch,* 17 U.S. at 404-05).

Reciprocally, the authority of the national government operates directly upon the people, as distinguished from the states themselves.

> [T]he constitutional design secures the founding generation's rejection of the concept of a central government that would act upon and through the States in favor of a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government."

Alden, 119 S. Ct. at 2247 (quoting The Federalist No. 15, at 109) (Alexander Hamilton) (other internal quotations omitted); *Term Limits,* 514 U.S. at 803 ("In adopting [the Constitution], the Framers envisioned a uniform national system, rejecting the notion that the Nation was merely a collection of States, and instead creating a direct link between the National Government and the people of the United States."); *New York v. United States,* 505 U.S. 144, 166 (1992)

("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.").

The importance of voting by the people in a representative democracy, such as the Constitution established, is so obvious that it is difficult to articulate its provenance. Yet, there is no dispute that voting by the people and the existence of a representative democracy are inextricably linked. One simply cannot exist without the other. As the Supreme Court has repeatedly recognized, following the words of Alexander Hamilton, it is a "fundamental principle of our representative democracy . . . that 'the people should choose whom they please to govern them.'" *Term Limits,* 514 U.S. at 795 (quoting *Powell,* 395 U.S. at 547 (quoting 2 Elliot's Debates 257)). As the *Reynolds* Court observed, "the right of suffrage is a fundamental matter in a free and democratic society" and "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." 377 U.S. at 555, 561.

Thus, the very structure of the national government, subjected by the Constitution to the ultimate sovereignty of the people, strongly negates the argument that either the Article I references to "States," or the absence of any mention of voting for the people of the District in the District Clause, necessarily precludes voting by and representation of the people of the District. Accordingly, the democratic principles reflected in the structure of the government created pursuant to the Constitution weigh decisively against the negative inference proposed by the defendants—an inference that would result in the denial of the right to vote for voting representation in the legislature with exclusive authority over the District.

For all of the above reasons, the literal references to the "States" in Article I do not necessitate denying to the people of the District the right to vote for voting representation in the House of Representatives.

3. Twenty-Third Amendment

Defendants also argue that the adoption of the Twenty-third Amendment, giving the people of the District to right to choose electors to participate in the elections of the President and Vice-President, necessarily means that a similar constitutional amendment would be required to provide the inhabitants of the District with the right to vote for voting representation in the House of Representatives. First, the defendants maintain the adoption of the amendment "confirm[s] the understanding *and intent* of both Congress and the people of the ratifying States that the District of Columbia is not otherwise a 'State' for purposes of federal elections except as provided for by this Amendment." Sec'y Opp. at 12-13; *see also* Memorandum of Points and Authorities in Support of the Motion to Dismiss of Defendants Robin H. Carle, Wilson Livingood and James M. Eagen III, and Opposition to Plaintiffs' Motion for summary Judgment in *Alexander, et al. v. Daley, et al.* at 23-24 (filed Dec. 18, 1998) ("House Officers Opp."). However, the suggestion that the understanding of the people adopting a constitutional amendment in 1961 could confirm the 1787 understanding of the Framers of the Constitution appears to have no precedent in constitutional interpretation.

Next, the defendants point to the legislative history of the amendment which includes the statement that it "would not authorize the District to have representation in the Senate or the House of Representatives." H. Rep. No. 86-1698, at 2-3, *reprinted in* 1960 U.S.C.C.A.N. 1459, 1462. Of course, no one is suggesting that the Twenty-third Amendment authorizes such representation.

Finally, the defendants argue plaintiffs' position must be rejected because "if plaintiffs' argument were correct, the 23rd Amendment would have been unnecessary." House Officers Opp. at 24. The defendants invoke Chief Justice Marshall's statement in *Marbury v. Madison* that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is

inadmissible, unless the words require it." 5 U.S. (1 Cranch) 137, 174 (1803). First, there is only a presumption, and not a rigid rule, against interpretations that yield superfluous constitutional provisions. For example, the Supreme Court has noted that Article I, section 8, clause 14, of the Constitution, which spells out Congress' power "[t]o make Rules for the Government and Regulation of the land and naval Forces," is "technically superfluous," *United States v. Stanley,* 483 U.S. 669, 682 (1987), in light of Article I, section 8, clause 18—the Necessary and Proper Clause. *See also* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 Val. U. L. Rev. 1 (1998); Sanford Levinson, *Accounting for Constitutional Change*, 8 Const. Commentary 409, 422-28 (1991). Second, the application of the presumption can, at best, only illuminate the meaning of the Twenty-third Amendment, not provisions of the original Constitution, such as Article I. The logic of the presumption is that the drafters of a document are unlikely to have included redundancies, but, of course, the drafters of Article I did not include the Twenty-third Amendment. In light of these considerations, the adoption of the 23rd amendment should not be relied upon in interpreting the original constitutional provisions at issue here. For the same reasons, the proposed, but never adopted, amendments pertaining to voting by District inhabitants shed no light on the issues before us.[42]

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[42] In 1978, Congress approved and submitted to the states for ratification an amendment to the Constitution providing that "for purposes of representation in Congress . . . the District . . . shall be treated as though it were a State." H.R.J. Res. 554, 95th Cong., 2d Sess. (1978). Only sixteen states approved it. *D.C. Vote Amendment Dies*, Cong. Q. 404, 404-05 (1985 Almanac). History records that, over the years between 1801 and 1978, Congress entertained up to 150 resolutions to amend the Constitution "to provide the District with some measure of voting to enfranchise District residents." *District of Columbia Representation in Congress: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the*

(continued...)

4. **Territories**

Two circuits have concluded that residents of the Territories have no right to participate in the election of the President or Vice President. *See Igartua de la Rosa v. United States,* 32 F.3d 8 (1st Cir. 1994) (*per curiam*), *cert. denied*, 514 U.S. 1049 (1995); *Attorney General of Guam v. United States,* 738 F.2d 1017 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985). Assuming, *arguendo*, that citizens of territories also lack the right to vote in Congressional elections, that would not necessitate denying the people of the District the right to vote for voting representation in the House of Representatives. No territory or its inhabitants were ever part of the "several States"; nor did the inhabitants of our territories ever vote for representation in the House. Nor were the people in the territories, or their forbears, ever ceded there. In contrast, the inhabitants of the District today are the political posterity of the original people of the District, who were, until ceded to the United States, "people of the several States" who voted in federal elections until 1801. Citizens of the territories cannot claim a similar provenance. The foregoing considered, it simply does not follow that because people of the territories have never been entitled to voting representation in Congress that the people of the District must necessarily be denied renewal of their right to vote for voting representation in the House of Representatives.

5. **Lapse of Time**

The mere fact that nonvoting by the people of the District has been a continuous and unbroken practice since

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Judiciary, 95th Cong., at 353-54 (1978) (Issue Brief, Congressional Research Service). After the failure of the 1978 amendment, a principal sponsor observed: "We all know what's going on here. Opponents of statehood have felt in the past that the District of Columbia is too urban, too liberal, too Democratic, too black." 124 Cong Rec. 26345 (1978) (statement of Sen. Kennedy).

1801 does not necessitate denying the people of the District today the right to vote for voting representation in the House of Representatives.[43] The Supreme Court has never hesitated to recognize constitutional rights, no matter when recognition is sought and no matter how long practices to the contrary have continued. Not so long ago, the Court observed, "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Powell,* 395 U.S. at 546-47; *cf. Puerto Rico v. Branstad,* 483 U.S. 219, 229 (1987) ("Long continuation of decisional law or administrative practice incompatible with the Constitution's requirements cannot overcome this Court's responsibility to enforce those requirements.").

The Supreme Court has a long history of recognizing previously unrecognized constitutional rights. For example, its landmark decision in 1954 that racial segregation of public school students violated the Fourteenth Amendment, *see Brown v. Board of Education,* 347 U.S. 483 (1954), reversed its 1896 decision that "separate, but equal" was all the equal protection clause required, *see Plessy v. Ferguson,* 163 U.S. 537 (1896). In 1964, the Court adopted the one-person, one-vote maxim as the standard for state legislative apportionment, *Reynolds,* 377 U.S. at 568, even though, as Justice Frankfurter had pointed out in an earlier dissent in "[t]he notion that representation proportioned to the geographic spread of population," had "never been generally practiced, today or in the past," *Baker v. Carr,* 369 U.S. 186, 301 (Frankfurter, J., dissenting). In 1986, the Court held that racially-based peremptory challenges violated the equal protection clause, *see Batson v. Kentucky,* 476 U.S. 79, 100 (1986), reversing its 1965 decision holding that peremptory challenges were immune from equal protection scrutiny largely because such scrutiny "would entail a radical change in the nature and

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[43] From the perspective of an 80 year old, 200 years is not all that long a time.

operation of the challenge," *Swain v. Alabama,* 380 U.S. 202, 221-22 (1965). In *Roe v. Wade,* 410 U.S. 113 (1973), the Court held that the right to privacy encompassed a woman's right to seek an abortion, even though abortion had long been treated as a crime in many states. Poll taxes, grandfather clauses, and white primaries were once commonplace; all are now unconstitutional. *See Harper,* 383 U.S. 663; *Guinn v. United States,* 238 U.S. 347 (1915); *Smith v. Allwright,* 321 U.S. 649 (1944). Just this past year, the Supreme Court severely curtailed Congress' power to abrogate States' sovereign immunity, despite years of permitting it virtually free rein in that area. *Alden,* 527 U.S. 706. And, of course, the literal application of the Bill of Rights to the States was not recognized until many years after adoption of the Fourteenth Amendment, and then only by a gradual process. *Compare, e.g., Adamson v. California,* 332 U.S. 46 (1947) *with Malloy v. Hogan,* 378 U.S. 1, 4-6 (1964) and *Gideon v. Wainwright,* 372 U.S. 335, 341-345 (1963).

For years, many voter apportionment issues never reached the courts because it was accepted doctrine that the apportionment of legislative districts involved a political question beyond the reach of the judiciary. *See, e.g., Colegrove v. Green,* 328 U.S. 549 (1946). It was not until the Court's 1962 decision in *Baker,* 369 U.S. 186, overruling *Colegrove*, that the courts began to address many long-suffered voting rights deprivations. Thus, as a practical matter, until *Baker v. Carr*, a suit like the plaintiffs would have been an exercise in futility.

III

EQUAL PROTECTION

The *Wesberry* Court notably limited to Article I its analysis of "one person, one vote" in congressional elections, putting aside any consideration of other constitutional provisions as sources of the right to vote. *Wesberry,* 376 U.S. at 9 n.10. The principle of *Wesberry*, standing alone, requires that the people of the District, the political posterity of the pre-

1801 voters, who were "people of the Several States," be given the opportunity to vote for a Member of the House of Representatives. Even if *Wesberry* itself did not mandate this conclusion, the plaintiffs argue, and I am persuaded, that the Equal Protection Clause of the Fourteenth Amendment, made applicable to the United States and its officers by the Fifth Amendment, provides a strong additional ground for a declaration that the inhabitants of the District have a constitutional right to vote for voting representation in the House of Representatives and that the failure of the Secretary to include inhabitants of the District in the apportionment violates equal protection principles. Accordingly, the Secretary has a constitutional duty to include the people of the District in any future apportionment and to calculate and report to the President the representation commensurate with such apportionment.

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Supreme Court has held that the principles embodied in this clause apply equally to the federal government, for the benefit of persons residing in the District of Columbia, by virtue of the due process clause of the Fifth Amendment. *See Bolling v. Sharpe,* 347 U.S. 497, 500 (1954) (holding that the principles embodied by the equal protection clause of the Fourteenth Amendment that prohibited States from maintaining racially segregated schools were applicable in the District of Columbia by virtue of the Fifth Amendment due process clause); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975) (noting that "[t]his Court's approach to the Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment"); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 217-18 (confirming continued vitality of *Weinberger*).

Basic equal protection principles require government, state and national, to treat similarly situated persons equally,

particularly with respect to constitutionally-based rights and privileges. *See, e.g., Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985); *Plyler v. Doe,* 457 U.S. 202, 216-17 (1982). The equal protection clause embodies a three-tiered system of review. Generally, the classification at issue is subject to "ordinary scrutiny." Under this test, the classification satisfies the requirements of equal protection as long as it is rationally related to a legitimate government end. *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 457-58 (1988); *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 16-17 (1973); *Plyler,* 457 U.S. at 217-18. At the other end of the spectrum are racial classifications and other governmental actions that impact on fundamental rights. These are subject to "strict scrutiny"; the government must demonstrate a compelling interest, and the classification must be narrowly tailored to meet that end. *See, e.g., Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 666 (1990); *Plyler,* 457 U.S. at 217. In the middle are classifications involving, for example, gender, which are subject to "intermediate scrutiny"—the end must be important, the means substantially related to the end. *See, e.g., Craig v. Boren,* 429 U.S. 190, 197 (1976). Application of any of these tests to continued denial of the right of District inhabitants to vote for voting representation in the House of Representatives should yield the same result: the equal protection clause entitles them to such representation because the United States has no interest, compelling or otherwise, in denial of it.

With respect to voting, the Supreme Court has held that the right to cast votes of equal weight in the selection of representatives to a legislature is a fundamental right whose denial must be subject to the strictest scrutiny. *See Reynolds,* 377 U.S. at 562 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Dunn v. Blumstein,* 405 U.S. 330, 337 (1972) ("[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court

must determine whether the exclusions are necessary to promote a compelling state interest." (internal quotation marks omitted)); *Harper,* 383 U.S. at 665 ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). As the Court explained in *Reynolds v. Sims*, in invalidating malapportioned state legislative districts:

> Diluting the weight of votes because of *place of residence* impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.

377 U.S. at 565 (internal citations omitted) (emphasis added).

The people of the District of Columbia are citizens of the United States, are subject to the laws passed by the Congress of the United States, and are the political posterity of the residents of the area which became the District in 1801, who voted for Congressional representation from 1790 until ceded to the United States in 1800. The population of the District has always been included in the decennial census. Yet, for the purpose of allocating seats in the House of Representatives, it is the practice and intention of the Secretary to exclude the District and the people there. Thus, the federal government treats the people of the District of Columbia differently from people residing in States, who are apportioned seats in the House of Representatives. In addition, the people of the District are treated differently from people residing in federal enclaves, over which Congress holds the same constitutional power of "exclusive legislation" that it holds over the people of the District. U.S. Const. art. I, § 8. Yet, the inhabitants of enclaves are included in apportionment and vote in Congressional elections in the state within which the federal enclave exists. *Evans v. Cornman,* 398 U.S. 419, 426 (1970) (people of enclave are also people of state surrounding enclave). The people of the District have no such apportionment or vote. Finally, the people of the District are

treated differently from United States citizens who reside overseas, who, by virtue of the Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. 99-410, 100 Stat. 924 (1986) (codified at 42 U.S.C. § 1973ff *et seq.*) (Overseas Voting Act), vote in Congressional elections in the state where they most recently lived.

None of the defendants disputes the fundamental nature of the right to vote, or that, generally, classifications, including classifications according to place of residence, impacting on that right must be subject to strict scrutiny. Nor do they contend that the federal government has a compelling interest that could justify depriving the people of the District of their right to vote for congressional representation. For the most part, the defendants argue, on several different grounds, that principles of equal protection simply do not apply. The closest they come to addressing the equal protection issue head on is to argue that if the plaintiffs' equal protection claim is accepted, then felons, minors and residents of territories must also be enfranchised. *See* House Officers' Reply to *Alexander* Plaintiffs' Consolidated Memorandum in Opposition to Defendants' Motions To Dismiss, and Reply in Support of Ps' Motion for Summary Judgment at 19 (filed Mar. 10, 1999) ("House Officers' Reply"). I will address each argument in turn. I find none persuasive.

First, the defendants argue that for equal protection to apply, the plaintiffs must have a preexisting constitutional right to vote. As Article I cannot be the source of that right, in their view, there is no cognizable equal protection claim. *See* Reply Memorandum of Secretary Daley and the United States in Support of Their Motion to Dismiss the Claims Brought by the *Alexander* Plaintiffs at 9-10 (filed Mar. 8, 1999). As I disagree with the defendants' premise that the people of the District do not have a preexisting constitutional right to vote, I see no merit in this argument. As previously explained in detail, the people of the District are the political posterity of the people who lived in the District between 1790 and 1800. Those people had and exercised a constitutional right to vote

for Congressional representation. Neither cession or any other event in the intervening years could have constitutionally taken away that right. Nor is the denial of that right mandated by the Constitution or reasonable negative inferences from it. Accordingly, the people of the District have a constitutional right to vote, albeit one that has been dormant since 1800; continued denial of that right where there is no compelling governmental interest violates equal protection principles.

Next, the defendants argue that the equal protection claims are invalid on their face because any statutory restriction on the plaintiffs' right to vote is merely reflective of the Constitution itself. If the Constitution precludes voting by DC, they argue, then there is no "constitutional" challenge that can be made to change that result. Secy' Opp. at 17. Again, as I disagree with the defendants' premise that the Constitution itself bars voting by the people of the District, *see supra* Part II, I see no merit in this argument either.

The defendants also argue that the equal protection clause does not apply because "plaintiffs have not challenged any classification actually drawn by Congress." House Officers' Opp. at 28. The plaintiffs respond that they are challenging "statutes and House and Senate rules—and [] the conduct of defendants in enforcing those statutes and rules." *Alexander* Plaintiffs Consolidated Memorandum in Opposition to Defendants' Motions to Dismiss, and Reply in Support of Plaintiffs' Motion for Summary Judgment at 4 (filed Feb. 8, 1999). The essence of the plaintiffs' case, however, is a challenge to the apportionment statute, as applied by the Secretary, which is properly subject to equal protection scrutiny. *Cf. Reynolds,* 377 U.S. at 568 (sustaining equal protection challenge to state apportionment scheme).

In addition, the defendants argue that equal protection principles cannot be applied because the people of the District are not "similarly situated" with respect to citizens of States, residents in federal enclaves, or overseas voters. The people of the District cannot be compared to citizens of States, they argue, because the Constitution itself, in Article I, Amendment

XVII, and Amendment XIV, § 2, distinguishes between the two. *See* House Officers' Opp. at 28-29. Even assuming *arguendo* that the defendants are correct in stating that the Constitution "distinguishes" between the citizens of the District and citizens of States, that does not resolve the issue. As discussed *supra*, there is nothing in the Constitution itself, or necessarily implied from it, that requires denying voting representation in Congress to the people of the District.[44] Moreover, the people of the District and citizens of States are similarly situated in that citizens of the States and the posterity of the pre-1801 District inhabitants are subject to the laws of the United States and, before the cession, both were inhabitants "of the several states." Accordingly, the two groups are "similarly situated" for equal protection purposes.

With respect to enclaves, the defendants argue that enclaves are significantly different from the District because residents of an enclave remain citizens of the State, enclaves do not change state boundaries, and states continue to exercise jurisdiction over enclaves. House Officers' Opp. at 29-30. However, the same clause of the Constitution authorizes the establishment of the District and federal enclaves and provides that Congress shall have the same power to exercise exclusive jurisdiction in each case. The people living in the areas that

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[44] It is noteworthy that the *Loughborough* Court approved direct taxation of District residents despite the fact that the tax apportionment requirement of Article I, like its voting apportionment requirement, referred only to apportionment among the several States. U.S. Const. art. I, § 2. The Court found that the negative inference, here invoked by defendants with respect to voting apportionment, was trumped by another provision of the Constitution: the taxing power vested in Congress by Article I. *Loughborough*, 18 U.S. at 322-23. So here, any such negative inference is trumped by other provisions of the Constitution, adopted in the wake of the Civil War and imported thereafter into the original Due Process clause of the Fifth Amendment: the Equal Protection clause.

became the District, just as the people living in the areas that have become federal enclaves, had a constitutional right to vote for representation in Congress. The Supreme Court has held, in *Evans v. Cornman,* 398 U.S. at 426, that residents of federal enclaves retain that right. The people of the District have the same interest as the people in federal enclaves, if not a greater interest, in having a voice in Congress, their ultimate legislature. At one time, when a presidentially-appointed three-person Board of Commissioners constituted the local legislative and executive authority in the District of Columbia (subject, of course, to Congress' exclusive legislation) there may have been a material difference between the political status of enclave people and the people of the District. However, since 1973, when Congress created a local government consisting of an elected mayor and an elected council with legislative authority (subject, of course, to Congress' exclusive legislation), and the equivalent of a state court system, the functional differences between the political status of District people and that of enclave people is more theoretical than real. Congress' exclusive legislative authority is ultimate. It can preempt any ordinance of the District Council and, it seems obvious, could also pre-empt any state law which purported to bind the people of any federal enclave in any state.

Defendants make much of the difference between Congress' exercise of its power of "exclusive legislation" with respect to the District and its exercise of its identical power with respect to the enclaves. They concede the obvious—that Congress' power with respect to the enclaves and with respect to the District is identical.[45] They disregard, however, the extent to which Congress' relaxation of its latent power with

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[45] For example, the National Institutes of Health became a federal enclave in 1953 when Maryland ceded jurisdiction over the property to the United States. *Evans,* 398 U.S. at 420-21 (citing Md. Code Ann. art. 96, § 34).

respect to the District parallels the relaxation with respect to the enclaves. Just as Congress has passed statutes permitting States to exercise their own authority in federal enclaves, so it has passed statutes permitting the District government to exercise its own authority within its enclave. For example, in federal enclaves, state criminal laws apply to "acts not punishable by any enactment of Congress," 18 U.S.C. § 13, states are permitted to levy and collect income, gasoline, sales and use taxes, 4 U.S.C. § § 104-110, and state unemployment laws and workers' compensation laws apply, 26 U.S.C. § 3305; 40 U.S.C. § 290. Moreover, at least at the National Institutes of Health (NIH), the federal enclave whose status was at issue in the *Evans* case, residents register their cars in Maryland, obtain drivers' permits and license plates from Maryland, are subject to the process and jurisdiction of the Maryland state courts, and send their children to Maryland public schools. *Evans,* 398 U.S. at 424. Similarly, the District, not the federal government, exercises direct, hands-on authority over motor vehicle registration and has its own school system. The District also has its own court system, completely independent of the federal courts, except that, like state courts, the decisions of its highest court are reviewable by the Supreme Court. District residents pay income, sales and other taxes to the District. In view of the foregoing, to distinguish the right of District residents to the same protection of the laws from that enjoyed by enclave residents is to belabor a distinction without a material difference. Accordingly, the apportionment statute, as applied by the Secretary, deprives the people of the District of equal protection of the laws because for apportionment it includes the census population of federal enclaves in the population of the state within which the enclave exists while excluding the census population of the District from the apportionment process.

The Overseas Voting Act, requires a State to "permit overseas voters" to participate (by absentee ballot) "in general elections for Federal office." 42 U.S.C. § 1973ff-1(3). An "overseas voter" includes "a person who resides outside the

United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." *Id.* § 1973ff-6(5)(C). The Act does not require States to permit overseas voters to vote in local or state elections. Nor does an overseas voter under the Act need to be a citizen of the State where voting occurs.[46] As a result, an overseas voter, despite the language of Article I, may vote in federal elections without having "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1.

The defendants argue that inhabitants of the District and overseas voters are not similarly situated for equal protection purposes because Congress has authorized voting by overseas voters. *See* House Officers' Opp. at 27.[47] However, the critical fact for equal protection analysis is not that there is a statute giving overseas voters their voting rights, but that this Act permits voting in federal elections by persons who are not citizens of any State nor qualified under the literal terms of Article I to vote in federal elections,[48] while inhabitants of the District, who are similarly situated, are denied that right.

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[46] The Act expressly specifies that "[t]he exercise of any right under this subchapter shall not affect, for purposes of any Federal, State or local tax, the residence or domicile of a person exercising such right." 42 U.S.C. § 1973ff-5.

[47] There is one difference—except for members of the Armed Forces living abroad, United States citizens overseas are there voluntarily. The political forebears of District inhabitants were ceded there without consent.

[48] In fact, under the Overseas Voting Act, a United States citizen residing outside the United States may be eligible to participate in federal elections, even though he or she had never been eligible to participate in any election while a citizen of a State. For example, the Act applies to an overseas voter who was too young to vote while a citizen of a State.

The defendants' suggestion that the Overseas Voting Act "extends" State citizenship to overseas voters in a manner that could not be applied equally to residents of the District is unsound. The Supreme Court has indicated that, at least with respect to elections of state officers, a State may limit participation to "bona fide residents" who live within its geographical boundary and have the intention to make the State their home indefinitely. *See Carrington v. Rash,* 380 U.S. 89, 94 (1965). An "overseas voter," however, does not reside within any State, and need not have any intention to make a particular State his or her home. *See Attorney General of Guam,* 738 F.2d at 1020. If Congress can disregard an overseas voter's failure to satisfy the two most basic traditional prerequisites for state citizenship, there is no reason why the fact that the overseas voter, unlike some residents of the District, was *recently* a bona fide resident of a State should be the distinction of ultimate constitutional dimension.

As the plaintiffs point out, if there is no constitutional bar to voting by overseas voters who are not "citizens of a State," there is no constitutional bar to voting by the people of the District. Accordingly, the inhabitants of the District and overseas voters are similarly situated and the extension of voting rights to one group, but not the other, must be justified by a compelling government interest.[49]

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[49] It is true that the First Circuit has asserted that, because the Overseas Voting Act "does not infringe [the right to vote] but rather limits a state's ability to restrict it," the Act "need only have a *rational basis* to pass constitutional muster." *Igartua de la Rosa,* 32 F.3d at 10 & n.2 (emphasis added). However, the Act goes beyond checking States' restrictions on the franchise; it permits voting by electors who are not eligible to vote for the most numerous branch of a State's legislature. Thus, it affirmatively extends the right to vote to United States citizens who are not literally qualified to vote under Article I, § 2, clause 1.

In applying the principles of equal protection in the context of State elections, the Supreme Court has made it clear that strict (continued...)

Given that inhabitants of the District and citizens of States, residents of enclaves and overseas voters are all similarly situated for equal protection purposes, and that the defendants do not argue that the government has any compelling interest in denying the right of District inhabitants to vote for voting representation in the House of

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scrutiny is applied to State "statutes distributing the franchise" which have the effect that "some resident citizens are permitted to participate and some are not." *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621, 628-29 (1969); *see also Harper,* 383 U.S. at 665. These same principles apply to the federal government through the due process clause of the Fifth Amendment—not as a formality, but because essentially the same justification for strict scrutiny of *statutes* governing the right to vote applies to both federal and state laws:

> The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Kramer, 395 U.S. at 628. The Overseas Voting Act is therefore squarely within the class of voting laws subject to strict scrutiny under the equal protection clause.

The majority also suggests that, in any event, citizens of the District who have never lived in any of the fifty states could not have an equal protection claim. The majority fails to suggest any compelling governmental interest in distinguishing between overseas voters and those District residents who have never lived in a State. Moreover, the majority apparently recognizes the violation of equal protection principles with respect to those District residents who previously have lived in a State.

Representatives, a right enjoyed by members of each of these other groups, the continued denial of that right violates equal protection principles. I have not overlooked that the defendants argue that the comparison to people in enclaves and overseas at most entitles the people of the District to vote for federal officers in State elections, not to elect their own Representatives. However, the fact that residents of enclaves and expatriates vote for federal officers in state elections does not necessarily imply that the only relief for the people of the District would be to vote in the elections of the state of Maryland. For residents of enclaves and overseas voters, voting in state elections can be seen as essentially a matter of convenience. As Marshall said about state ratifying conventions—where else should they vote? The pragmatic answer with respect to voting representation in the House of Representatives for the people of the District is that it is more convenient and logical that the political posterity of the pre-1801 voters for representation in the House should and could use the District apparatus for electing presidents, mayors and council members, available only in the last half of the Twentieth century.

Finally, the defendants argue that if the people of the District have an equal protection right to vote in Congressional elections, so too must felons, minors and residents of territories. However, equal protection principles do not dictate such a conclusion. Felons, for example, forfeit certain constitutional rights, including the right to vote, because of their criminal conduct. The government's interests in depriving felons of their voting rights, presumably deterrence and punishment, arguably compelling interests for equal protection purposes, bear no relation to the government's ephemeral interest, if any, in depriving the people of the District of voting rights merely because of the place where they live. Moreover, the Supreme Court has held that the Fourteenth Amendment, which provides that a State's representation in Congress shall not be reduced if it disenfranchises citizens for "participation in rebellion, or other crime," U.S. Const. amend. XIV, § 2, contemplates and

approves of the disenfranchisement of convicted felons. *See Richardson v. Ramirez,* 418 U.S. 24, 54 (1974). The explicit constitutional recognition that felons can be disenfranchised, and the fact that their loss of voting rights is directly attributable to their own misconduct, is a material difference which renders untenable any comparison of their nonvoting with recognizing the voting rights of the people of the District.

Nor does the nonvoting of minors as a group preclude restoration of voting representation for the people of the District on equal protection grounds. First, there has been no showing that minors (however defined) as a class ever voted. In contrast, residents of the District voted for a Member of the House of Representatives until 1801. Second, minors have never been considered as having the same constitutional rights as adults. *See Vernonia Sch. Dist. v. Acton,* 515 U.S. 646, 654 (1995) (upholding random urinalysis testing of minors in a public school); *Hutchins v. District of Columbia,* 188 F.3d 531, 541 (D.C. Cir. 1999) ("children's rights are not coextensive with those of adults"). Finally, although this precise issue has never been addressed, I believe that the government has a compelling interest in foreclosing minors, who are presumptively not qualified by intelligence or experience to participate in its political process, from voting. If not compelling, the government's interest is certainly important, arguably the applicable standard under the equal protection clause where it is the fundamental rights of minors being infringed[50] *Hutchins,* 188 F.3d at 541 (applying

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[50] The Supreme Court recently reaffirmed that classifications based simply on age are not suspect under the equal protection clause and are evaluated only to determine whether they bear a rational relationship to a legitimate governmental interest. *Kimel v. Florida Bd. of Regents,* 120 S. Ct. 631, 645 (2000); *see also Gregory v. Ashcroft,* 501 U.S. 452, 473 (1991); *Vance v. Bradley,* 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316-17 (1976). That analysis does not dispose of the issue here, however, because a denial of the right to vote also (continued...)

heightened scrutiny). Accordingly, denying their voting rights while enfranchising the people of the District does not violate equal protection principles.

Finally, recognizing the voting rights of the people of the District would not necessitate enfranchising residents of United States territories. *See supra* Part II.C.4. To reiterate, people residing in territories, or their political predecessors, were never part of the "people of the several states" and they have never enjoyed a constitutionally protected right to vote. Absent any such right, the people of the territories have no claim that they would be denied equal protection of the laws if District inhabitants have voting representation while the status quo is continued in the territories. For this reason, recognizing voting rights for the people of the District would not necessitate a similar result with respect to the people in the territories.

IV

Accordingly, for the reasons set forth, the people of the District of Columbia are entitled to participate in the election of members of the United States House of Representatives. The apportionment statutes, as presently applied, interfere with the exercise of constitutional rights of residents of the District of Columbia. I would declare these statutes, as applied, unconstitutional and declare that the Secretary of Commerce has a constitutional duty to include the population of the District of Columbia in the apportionment of seats to the House of Representatives. Again, as the questions with respect to the Senate and the Control Board are not a challenge to apportionment—the basis for convening this three-judge district court—I agree that this Court should "decline to exercise any discretionary jurisdiction we may have over"

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infringes on a fundamental right which merits either strict or intermediate scrutiny.

those claims. *Adams v. Clinton,* 40 F. Supp. 2d 1, 5 (D.D.C. 1999).

DATED: May 17, 2000

s/ Louis L. Oberdorfer
UNITED STATES DISTRICT JUDGE

LOIS E. ADAMS, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 98-1665
	)	
WILLIAM JEFFERSON CLINTON, *et al.*	)	
	)	
Defendants.	)	

CLIFFORD ALEXANDER, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 98-2187
	)	
WILLIAM M. DALEY, *et al.*	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM

In 1998, two complaints were filed, each alleging, *inter alia*, that inhabitants of the District of Columbia are being unconstitutionally deprived of their right to vote for voting representation in the House of Representatives and the Senate.

Complaint, *Adams v. Clinton*, Civil No. 98-1665 (D.D.C. filed June 30, 1998),[1] Amended Complaint, *Alexander v. Daley*, Civil No. 98-2187 (D.D.C. filed Oct. 20, 1998).[2] As both complaints "challeng[ed] the constitutionality of the apportionment of congressional districts," 28 U.S.C. § 2284(a), the cases were consolidated, and a three-judge court was convened. *Adams v. Clinton,* 26 F. Supp. 2d 156 (D.D.C. 1998). The three-judge court has addressed, in an opinion filed today, the apportionment issue, finding standing on account of the claim against the Secretary of Commerce. *Adams v. Clinton,* Civil Nos. 98-1665, 98-2187, slip op. Part III (D.D.C. Mar. 20, 2000) (three-judge court) (Oberdorfer, J., dissenting). That court held that inhabitants of the District are not being unconstitutionally deprived of their right to vote for voting representation in the House of Representatives and, therefore, the District is not entitled to be apportioned seats in the House commensurate with its population. *Id.* Part IV. It declined jurisdiction, however, over the plaintiffs' claims seeking representation in the Senate and challenging the existence of the Control Board, as those claims do not concern apportionment. *Id.* Part II. Those claims have been remanded to this single-judge court for resolution. *Id.* For the reasons explained herein, those claims will be dismissed.

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[1] In *Adams v. Clinton*, the plaintiffs, District residents, sued the President of the United States, the Clerk of the House of Representatives, the Sergeant-at-Arms of the House of Representatives, and the District of Columbia Financial Responsibility and Management Assistance Authority (the "Control Board").

[2] In *Alexander v. Daley*, the plaintiffs, District residents and the District of Columbia itself, sued the United States, the Secretary of Commerce, the Clerk of the House of Representatives, the Sergeant-at-Arms of the House of Representatives, the Chief Administrative Officer of the House of Representatives, the Secretary of the Senate and the Senate Sergeant-at-Arms and Doorkeeper.

I

The Senate

A

A detailed summary of the facts is contained in the majority and dissenting opinions filed in the three-judge court portion of these cases. Only the critical facts with respect to the Senate are summarized here. When the Constitution was adopted, Article I, section 3, provided that members of the United States Senate would be elected by State legislatures, not by the people themselves, and that each State would elect two Senators. U.S. Const. art. I, § 3.[3] It was not until 1913, when the Seventeenth Amendment was ratified, that Senators were elected directly by the people. *Id.* amend. XVII.[4] As a result, when the United States assumed exclusive jurisdiction over the District in 1801, inhabitants had been voting for representation in the House of Representatives, but had never voted for representation in the Senate.

As the Constitution establishes that each State is entitled to two Senators, there is no need for the apportionment of seats that takes place prior to the election of members of the House of Representatives. Each State takes whatever steps it deems necessary to hold an election for Senator. Once a Senator is elected, the State sends a certificate to the Senate. The Secretary provides a model certificate "to the governor and secretary of each State wherein an election is

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[3] In its original form, the Constitution provided: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote." U.S. Const. art. I, § 3.

[4] The Seventeenth Amendment provides: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote." U.S. Const. amend XVII.

about to take place or an appointment is to be made." Standing Rules of the Senate, Rule II.3, *reprinted in* Senate Manual, S. Doc. No. 104-1 (1995). The Secretary is also responsible for keeping a record of the certificates. *Id.*, Rule II.2. At the beginning of each Congress, the President of the Senate lays the certificates of new Senators before the Senate for recognition. If there is no objection, the President then administers the oath of Office to these Senators. If there are issues about the qualifications or election of a particular Senator, the Senate Committee on Rules and Administration resolves them, subject to the ultimate authority of the Senate as a whole. *Id.*, Rule XXV.1(n)(1)(4). Once the new Senators have taken the oath of Office, the Secretary pays their salaries, 2 U.S.C § 60c-1, and the Sergeant at Arms and Doorkeeper admits them to the floor of the Senate while it is in session.[5] Standing Rules of the Senate, Rule II.3. The District of Columbia Board of Elections has never held an election for Senator, has no present plans to do so, and, indeed, lacks the authority to do so under District law.

B

With respect to the Senate, the plaintiffs allege that denial of their right to vote for voting representation in that body deprives District inhabitants of their rights to equal protection, to the privileges of national citizenship, and to substantive and procedural due process. They contend that the Seventeenth Amendment does not pose a structural barrier to the relief they seek because the inhabitants of the District were at one time "people of the several States," for whom the

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[5] Senate rules provide that: "Other than the Vice President and Senators, no person shall be admitted to the floor of the Senate while in session." Standing Rules of the Senate, Rule XXIII. However, Senate staff and certain dignitaries, including the Mayor of the District, are also admitted, although they are not eligible to vote. *Id.*; *see also* Rules for Regulation of the Senate Wing of the U.S. Capitol, Rule I, *reprinted in* Senate Manual, S. Doc. No. 104-1.

Constitution "secured . . . all the rights and privileges it conferred on other Americans, including the right to representation in the Congress." Memorandum in Support of Motion of Plaintiffs *Alexander et al.* for Summary Judgment at 45 (filed Nov. 11, 1998). The plaintiffs relied on similar arguments to support their claim that they were being unconstitutionally deprived of their right to vote for voting representation in the House. The majority of the three-judge court, which today decided the apportionment portion of these cases, rejected that argument on the merits. Thus, although the majority opinion did not directly address the merits of the plaintiffs' claim with respect to the Senate, its reasoning applied to the Senate claim would lead to the same conclusion. It is also noteworthy that the three-judge court divided over this issue: whether the undisputed fact that inhabitants of the area that became the District voted for voting representation in the House until 1801 necessarily leads to the conclusion that they thereby secured that right for them and their political posterity. However, until adoption of the 17th Amendment in 1913, neither they, nor anyone else in the United States, voted directly for Senators.

In their opposition to the plaintiffs' motion for summary judgment, the defendants conspicuously failed to address the merits of their claims, contending that these cases should be dismissed for lack of standing and because the Speech or Debate Clause precludes this action. Memorandum of Points and Authorities in Support of Motion of Senate Defendants to Dismiss and in Opposition to Motion of Plaintiffs for Summary Judgment in *Alexander, et al. v. Daley, et al.* at 1 (filed Dec. 18, 1998). The Supreme Court has made clear that courts must resolve questions of standing before any consideration of the merits. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 93-102 (1998).

Article III of the Constitution requires the following, at a minimum, to establish standing:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected

> interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations, footnotes and quotations omitted). Plaintiff bears the burden of establishing these elements. *Id.* at 561.

The Secretary of the Senate and the Sergeant at Arms and Doorkeeper of the Senate assert that the plaintiffs cannot satisfy either the causation or redressability prongs of the standing inquiry. With respect to causation, the Senate defendants argue that the plaintiffs' injury cannot fairly be traced to the defendants' actions because neither the Secretary nor the Sergeant at Arms has taken, or threatened to take, any action that has, or would, interfere with the plaintiffs' exercise of their claimed right to vote for and elect a Senator. Senate Motion to Dismiss at 6. In particular, the defendants point to the following facts: (1) the Sergeant at Arms has never refused to admit to the floor of the Senate any person purporting to represent the District; (2) the Secretary has never refused to record the election of a Senator elected by the inhabitants of the District; (3) the Secretary has never refused to pay the salary of a Senator elected by the inhabitants of the District; (4) although the Secretary has never sent the mayor of the District a model certificate for recording the election of a Senator, if the District were to elect a Senator, it could send a certificate to the Senate that did not follow the model form; (5) the Senate, not the Sergeant at Arms or the Secretary, decides whether to recognize an individual as a duly appointed or elected Member of the Senate, who is thereby, *inter alia*,

entitled to be admitted to the floor of the Senate and paid; (6) neither the Secretary nor the Sergeant at Aims has taken any action, nor could they, that prevents District residents from holding an election for Senator; (7) the District of Columbia Board of Elections has never conducted, or stated an intent to conduct, an election for a Senator; and (8) the laws of the District of Columbia do not authorize the District of Columbia Board of Elections to conduct such an election. All of these facts, the defendants argue, demonstrate that the causal link between the defendants' conduct and the plaintiffs' injury is too attenuated to satisfy the causation requirement of Article III standing.

The plaintiffs argue that the actions of the Senate defendants satisfy the causation element of standing because they "enforce the statutes, rules and determinations that prevent District citizens from being represented in the . . . Senate." *Alexander* Plaintiffs Consolidated Memorandum in Opposition to Defendants' Motions To Dismiss, and Reply in Support of Plaintiffs' Motion for Summary Judgment at 32 (filed Feb. 8, 1999). Plaintiffs also argue that the fact that the Senate officers have never refused to admit to the floor, record the certificate for, or pay a person purporting to be a Senator elected by the District is not determinative because "defendants' undisputed intent to enforce the exclusion of District representatives from Congress satisfies the traceability requirement." *Id.* at 33. Plaintiffs assert that holding an election for Senator at this time would be futile, because it is clear that the Senate, and therefore the Senate officers, would not recognize anyone elected by the District as a duly elected Senator. *Id.* at 36.

The causation question presented by these cases is novel and difficult. The closest the Supreme Court has come to addressing this question is in its decision in *Franklin v. Massachusetts,* 505 U.S. 788 (1992). *Franklin* is discussed extensively in the majority opinion filed in the three-judge court portion of this ease, a part of the opinion to which I concurred. In brief, the *Franklin* Court addressed a challenge

to the apportionment of overseas voters by finding that there was standing to sue the Secretary of Commerce. *Id.* at 801-03. Thus, it was unnecessary for the Court to reach the question of whether there was standing to bring such a claim against officers of the House. *Id.* at 803. The three-judge court majority opinion in these cases takes the same approach, thus leaving open the question of whether the plaintiff here could have maintained their claims against the House officers if the Secretary of Commerce had not been a defendant.

Nor is this case controlled by the Supreme Court's decision in *Powell v. McCormack,* 395 U.S. 486 (1969). In *Powell*, the Court found that the plaintiff, a duly elected Representative from the State of New York whom the House of Representatives refused to seat, had standing to sue the House officers who had refused to seat him and to pay his salary. *Id.* at 487. *Powell* is distinguishable from the present case for several reasons. The plaintiff in *Powell* had actually been re-elected by the people of New York as a Representative. The injury complained of in *Powell* was the actual refusal to seat or pay him as a Representative. Here, the plaintiffs are residents of the District who would be eligible to vote in an election, if there were one, for a Senator to represent the District. The injury complained of is the deprivation of their right to vote for a member of the Senate. The causation inquiry, therefore, is not comparable.

It bears repeating that it is the plaintiffs who bear the burden of establishing the elements of standing. *Lujan,* 504 U.S. at 561. Moreover, the sensitive constitutional issues which lurk in the merits of plaintiffs' claim bring to mind Justice Brandeis' caution that a court should not "decide questions of a constitutional nature unless absolutely necessary." *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Finally, the Supreme Court recently admonished that the judiciary must be most cautious in deciding whether "action taken by one of the other two branches of the Federal Government was unconstitutional." *See Raines v. Byrd,* 521 U.S. 811, 819-20

(1997). With these considerations in mind, I am not persuaded that the plaintiffs have established the necessary causal link between the defendants' actions and their injury. The plaintiffs' alleged injury is the denial of their right to vote for a member of the Senate. If the plaintiffs were to prevail on the merits, their injury simply would not be fairly traceable to the actions of the Senate defendants. Nothing that the Secretary of the Senate or the Sergeant of Arms and Doorkeeper of the Senate has done, or intends to do, would have substantially contributed to their injury. Before either of the Senate defendants would be called upon to take any of the actions the plaintiffs seek to enjoin, a law would have to be passed authorizing the Board of Elections to conduct an election for Senator, the Board of Elections would have to hold such an election, and the Senate would have to refuse to recognize the individual identified by the District as a Senator.[6] It is by no means certain that all, if any, of these events would ever take place.[7] Plaintiffs' suggestion that an election today would be "futile" because the Senate would surely refuse to seat any Senator elected by the District does not change the fact that the plaintiffs' present injury is not clearly traceable to the defendants.

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[6] At the argument on pending motions, counsel for the Senate defendants represented that if the District of Columbia certified a senator and the Senate decided the certification was in order, that Senate defendants would "perform their functions on behalf of those individuals." Transcript of Apr. 19, 1999, at 81-83.

[7] In contrast, the Secretary of Commerce has excluded the inhabitants of the District from his apportionment of seats in the House of Representatives in the past and intends to continue the practice in the future. This concrete action was the basis for the three-judge court's conclusion that the plaintiffs had standing to bring against the Secretary their claim that they are being deprived of their constitutional right to vote for voting representation in the House.

Accordingly, the motion of the Senate officers to dismiss for lack of standing will be granted. Having reached that conclusion, there is no need to address the defendants' argument that the plaintiffs also fail to establish the redressability element of standing.

II

The Control Board

The *Adams* complaint names as a defendant the District of Columbia Financial Responsibility and Management Assistance Authority (the Control Board). It alleges that the existence of the Control Board deprives them of their constitutional right to equal protection of the laws and their right to a republican form of government. The Control Board has moved to dismiss on the ground that the *Adams* plaintiffs lack standing to bring these claims and for failure to state a claim upon which relief can be granted.

A

In 1995, Congress enacted the District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, 109 Stat. 97 (1995) (codified as amended D.C. Code Ann. § 47-391.1 - 47-393 (1996)). The Act created the District of Columbia Financial Responsibility and Management Assistance Authority (the Control Board) as "an entity within the government of the District of Columbia" and "not established as a department, agency, establishment or instrumentality of the United States Government." *Id.* The Act, *inter alia*, authorizes the Control Board to review and approve the financial plan and budget for the fiscal year, as submitted by the Mayor and enacted by the City Council, to review Council acts, to review certain contracts and leases, to submit recommendations to the Mayor, the Council, the President and Congress on actions that the District government should take to ensure compliance with the financial plan and budget, to issue bonds upon request by the Mayor, and to lodge or grant a security interest to individuals or entities purchasing bonds, notes or other obligations. *Id.*

Nothing in the Act gives the Control Board any authority over or responsibilities pertaining to elections in the District of Columbia.

B

The essence of the *Adams* plaintiffs' equal protection claim is that the existence of the Control Board violates their right to equal protection of the laws by "preventing [them] from electing representatives to Congress having full powers and rights under the Constitution [and] preventing them from enjoying the benefits of citizenship in a state." Complaint ¶ 71. The Control Board asserts that the *Adams* plaintiffs cannot satisfy any of the three necessary components of standing—injury-in-fact, causation or redressability. Looking first at redressability, it is not apparent how the abolition of the Control Board would redress the *Adams* plaintiffs' injury. It certainly would not entitle the inhabitants of the District to elect representatives to Congress or permit them to enjoy the benefits of citizenship in a state. As the *Adams* plaintiffs cannot establish that their equal protection injury would be remedied by abolition of the Control Board, it is not necessary to address whether the other elements of standing, injury-in-fact and causation, are present. Nor is it necessary to address the Control Board's failure to state a claim argument. Accordingly, the *Adams* plaintiffs' equal protection claim against the Control Board will be dismissed for lack of standing.

The *Adams* plaintiffs' other claim is that the existence of the Control Board violates their right to a republican form of government under the Guarantee Clause of the Constitution. U.S. Const. art IV, § 4. Again, the Control Board argues that *Adams* plaintiffs lack standing to bring this claim. Here, however, the *Adams* plaintiffs have clearly alleged a concrete injury (deprivation of their right to a republican form of local government) that is traceable to the existence of the Control Board, and that would be redressed, at least in part, by its elimination.

Turning to the merits, Article IV, § 4, provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4. Historically, such claims have usually been treated as nonjusticiable political questions. *New York v. United States,* 505 U.S. 144, 184 (1992); *see, e.g., Hobson v. Tobriner,* 255 F. Supp. 295, 299 (D.D.C. 1966) (declining to address republican guarantee question). However, even assuming that this claim is justiciable,[8] the *Adams* plaintiffs have failed to state a claim upon which relief can be granted. The District Clause of the Constitution gives Congress the power of "exclusive legislation" over the District. Thus, Congress is clearly the constitutionally-designated ultimate "legislature" for the District. As the court observed in *Hobson,* "it is apparent that Congress has plenary power over the District of Columbia and has passed legislation from time to time setting up various forms of government." 255 F. Supp. at 299. Any claim that the inhabitants of the District are being denied their constitutionally guaranteed republican form of government must be directed toward their lack of representation in Congress—not to their lack of representation in any subsidiary body that Congress chooses to create and empower with authority over the District, subject always to Congress' ultimate power of "exclusive legislation." *Cf. Shook v. District of Columbia Financial Responsibility and Management Assistance Authority,* 132 F.3d 775, 781 (1998) (noting that "[a]ppellants concede, however-as they must-that their right to vote for a Board of Education, granted by Congress, can be taken away by Congress"). Similar challenges to such bodies on the ground that the inhabitants of the District were not given a voice in their selection have been dismissed for failing to present a "substantial" federal question. *See, e.g., Carliner v. Commissioner,* 412 F.2d 1090,

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[8] The Supreme Court suggested in *New York v. United States* that perhaps not all Guarantee clause claims are nonjusticiable. *New York,* 505 U.S. at 185.

1091 (D.C. Cir. 1969) (holding that challenge to appointed mayor and city council on ground that "citizens of the District have not been given the opportunity by popular vote to elect persons to th[ose] positions" was "insubstantial"); *Hobson*, 255 F. Supp. at 299.[9] It is one thing to say that the apportionment clause requires representation in the House of Representatives for District inhabitants, and to that extent the benefits of a republican form of government. *See Adams v. Clinton*, Nos. 98-1665, 98-2187 (D.D.C. Mar. 20, 2000) (three-judge court) (Oberdorfer, J., dissenting). It is quite another thing to say that, despite Congress' power of "exclusive legislation," Congress cannot create another body with authority over the inhabitants of the District always subject to its power of exclusive legislation. Accordingly, the *Adams* plaintiffs' guarantee clause claim against the Control Board will be dismissed.

An accompanying Order implements the decisions announced herein.

DATED: March 20, 2000

s/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

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[9] Unlike a three-judge court whose decisions are reviewable only by the Supreme Court, the issues addressed here are unquestionably controlled by Circuit authority.

LOIS E. ADAMS, *et al.*)
)
Plaintiffs,)
)
v.) No. 98-1665
)
WILLIAM JEFFERSON CLINTON,)
et al.)
)
Defendants.)

CLIFFORD ALEXANDER, *et al.*)
)
Plaintiffs,)
)
v.) No. 98-2187
)
WILLIAM M. DALEY, *et al.*)
)
Defendants.)

ORDER

For the reasons stated in an accompanying Memorandum, it is this 20th day of March, 2000, hereby

ORDERED: that the Motion to Dismiss of the District of Columbia Financial Responsibility and Management Assistance Authority is GRANTED; and it is further

ORDERED: that the Motion of Senate Defendants to Dismiss is GRANTED; and it is further

ORDERED: that the *Adams* Plaintiffs Motion for Summary Judgment on all claims except those pertaining to apportionment and addressed by the three-judge court is DENIED; and it is further

ORDERED: that the *Alexander* Plaintiffs' Motion for Summary Judgment on all claims except those pertaining to apportionment and addressed by the three-judge court is DENIED.

s/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

LOIS E. ADAMS, *et al.*	)	
Plaintiffs,	)	
	)	
v.	)	No. 98-1665
	)	
WILLIAM J. CLINTON, *et al.*	)	
	)	
Defendants.	)	

CLIFFORD ALEXANDER, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 98-2187
	)	
WILLIAM M. DALEY, *et al.*	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

November 6, 1998, Filed

MEMORANDUM

Two complaints filed by two sets of residents of the District of Columbia allege that Congress has unconstitutionally excluded them from apportionment to a

congressional district. Orders entered November 3, 1998, consolidated the cases. Preliminarily, both sets of plaintiffs request that their cases be set before a three-judge district court in the manner contemplated by 28 U.S.C. § 2284(b)(1). That statute requires the convening of such a court "when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). Whether a three-judge court is called for turns on: "(1) whether the complaint formally alleges a basis for equitable relief; (2) whether the constitutional question presented is substantial; and (3) whether the case presented otherwise comes within the requirements of the . . . three-judge statute." *Police Officers' Guild, Nat'l Union of Police Officers v. Washington,* 369 F. Supp. 543, 548-49 (D.D.C. 1973).

I

The defendants named in the complaint in *Adams v. Clinton* include the President, ministerial officials of the House of Representatives, and the District of Columbia Financial Responsibility and Management Assistance Authority. The President and the House officials are alleged to have a role in effecting periodic apportionments to congressional districts as contemplated by Article I, § 2, cl. 3, of the Constitution; the *Adams* complaint seeks to enjoin their execution of any further apportionment until Congress has cured the claimed violations of plaintiffs' alleged constitutional rights. In addition, the *Adams* plaintiffs seek declarations that the present apportionments denying them representation in Congress violate their constitutional rights to a republican form of government and to the equal protection of the laws, as guaranteed by Article IV, § 4, and § 1 of the Fourteenth Amendment. These substantive complaints and plaintiffs' prayers for relief allege bases for equitable relief (which may or may not be granted) that clearly satisfy the first prong of the *Police Officers Guild* syllogism.

II

Whether either constitutional question is substantial presents a more difficult problem. It is plaintiffs' contention, essentially, that the results of the reapportionment process, mandated by Congress in lieu of decennial reapportionment legislation, *see Franklin v. Massachusetts,* 505 U.S. 788, 791-92 (1992), violate Congress' constitutional apportionment obligation. The process does not merely provide plaintiffs with disproportionate representation in Congress; it provides no representation—zero. *Compare Board of Estimate of New York v. Morris,* 489 U.S. 688, 70 (1989) with *Swann v. Adams,* 385 U.S. 440 (1967). Thus, plaintiffs argue that the apportionment process deprives them of a republican form of government because it leaves them unrepresented in the legislative body (Congress) authorized by the Constitution "[t]o exercise exclusive Legislation in all Cases whatsoever" involving them and the political subdivision in which they reside, the District of Columbia. U.S. Const. art. I, § 8, cl. 17. Plaintiffs also claim that they are denied the equal protection of the laws because District residents, who are subject to Congress' "exclusive" legislative power, are not represented in Congress, while residents of former federal enclaves and other sites over which Congress is empowered to "exercise like Authority" are. *Id.* (defining other sites as "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," *e.g.*, the Bethesda Naval Hospital Complex).

A constitutionally insubstantial claim, for three-judge court purposes, has been authoritatively described as "essentially fictitious," "*wholly* insubstantial," "*obviously* frivolous," and "*obviously* without merit," words that "[i]n the context of prior [Supreme Court] decisions . . . import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous . . . ." *Goosby v. Osser,* 409 U.S. 512, 518 (1973) (citations omitted) (emphasis added); *see also Washington v. Confederated Tribes,* 447 U.S. 134, 147-48 (1980); *LaRouche v. Fowler,* 152 F.3d 974, 982-83, 986 (D.C. Cir. 1998).

While plaintiffs cite no cases that embrace their theories, they emphasize that their claims raise original issues that have textual and tangential decisional support. For example, in another context they point to the following statement of the Supreme Court in *Board of Estimate of New York v. Morris*: "[I]n this country the people govern themselves through their elected representatives and . . . each and every citizen has an inalienable right to full and effective participation in the political processes of the legislative bodies of the [n]ation, [s]tate, [and] locality . . . ." 489 U.S. at 693 (citations omitted).

Plaintiffs also confront dictum of the D.C. Court of Appeals that the Guarantee Clause "applies to the states and cannot be read to restrict the power of Congress to legislate for the District." *Darby v. United States,* 681 A.2d 1156, 1158 (D.C. 1996), *cert. denied*, 519 U.S. 1034 (1997). Plaintiffs argue, however, that a D.C. Court of Appeals decision is not preclusive, that its dictum is supported by no relevant Supreme Court authority, and that the issue in *Darby* about jurisdiction of the D.C. courts involved a quite different question from those posed here. It appears that no case binding on this court resolves the question whether, in the context here, the District may or should be treated as State for the purpose of Article 4, § 4. *Cf. District of Columbia v. Carter,* 409 U.S. 418, 420 (1973).

The plaintiffs contend that no court has ruled authoritatively on the question whether a republican form of government, as that term is used in the Constitution, is denied to other persons unrepresented in the body that has authority "[t]o exercise exclusive Legislation . . . over" them and the District in which they live. Article IV, § 4, obligates "[t]he United States" (not just the Congress) to "guarantee to every State . . . a Republican Form of Government, and [to] protect each of them against Invasion . . . and . . . against domestic Violence." If, as it seems apparent, Article IV, § 4, obligates the United States to afford the District and its residents the same protection from "Invasion" and "domestic Violence" as

is enjoyed by the several states and their residents, it may follow that, to the extent, if any, that Article IV guarantees to the states and their residents a republican form of government vis-a-vis the legislature that governs them, the District and its residents are entitled to the same guarantee—irrespective of whether the District is a State for the purpose of the Guarantee Clause. The plaintiffs' claims are not rendered "obviously without merit" by cases suggesting that the Guarantee Clause necessarily involved a political question. *See New York v. United States,* 505 U.S. 144, 183-86 (1992).

Further, it is not obvious that plaintiffs' equal protection claim is frivolous. The mere fact that plaintiffs are not challenging a statute that draws explicit distinctions between the District of Columbia and other federal enclaves with respect to apportionment does not establish conclusively that they are not challenging an arguably discriminatory distinction drawn by Congress and affected by the apportionment process conducted periodically by defendants. Therefore the equal protection claim is not obviously without merit.

Then there is the Twenty-third Amendment, § 1 of which states:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to *the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State*, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the

> District and perform such duties as provided by the twelfth article of amendment.

(emphasis added). It could be argued that the plaintiffs' claims would mean that the Twenty-third Amendment was superfluous. *Cf. Hobson v. Tobriner,* 255 F. Supp. 295, 300 (D.D.C. 1966); Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 Geo. Wash. L. Rev. 475 (1992). While this might be a significant issue in resolving the merits, it cannot be decisive at this stage. Constitutional interpretation that renders a provision of the Constitution superfluous may be disfavored, but it does not make the proposed interpretation patently frivolous. *See, e.g., United States v. Stanley,* 483 U.S. 669, 682 n.6 (1987); Sanford Levinson, *Accounting for Constitutional Change*, 8 Const. Commentary 409, 422-28 (1991).

Or perhaps the language of the Amendment underscored above dooms the plaintiffs' allegations: it seems to imply that the District is not entitled to representation in Congress. But the implication is not strong enough to extinguish the plaintiffs' claims at the threshold of their suits. If the Constitution entitled the District to voting representation in Congress before the Twenty-third Amendment, the underscored language did not *unquestionably* work a repeal. If the Constitution did not entitle the District to voting representation in Congress prior to the Amendment, the Amendment is irrelevant to the analysis—no one is arguing that it *created* such an entitlement. And there does not seem to be evidence that the Twenty-third Amendment was intended to resolve ambiguity about the right of District citizens to vote in Congress. *See* David E. Kyvig, *Explicit & Authentic Acts, Amending the U.S. Constitution 1776-1995*, at 352-55 (1996). The language of the Twenty-third Amendment very likely reflects the assumption that District citizens had no right to elect voting members of Congress. *See* H. Rep. No. 86-1698, at 2-3, *reprinted in* 1960 U.S.C.C.A.N. 1459, 1460-61. But the

assumptions of the participants in the drafting and ratifying of the Twenty-third Amendment do not necessarily indicate the proper interpretation of constitutional provisions adopted by the Founders. In addition, the underscored language appears to have been chosen merely to conform closely to the formulation of Article II, § 1—"Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress"—rather than to affect the right to elect voting members of Congress. *See* H.R. Rep. No. 86-1698, at 4 (1960), *reprinted in* 1960 U.S.C.C.A.N. 1459, 1462.

Even if there is some apparent tension between the Twenty-third Amendment and Article 4, § 4, that would not render the plaintiffs' claims wholly insubstantial. If essence of the ideal republican form of government is the right to representation in the governing *legislature*, *see. e.g.*, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 328 (Jonathan Elliot ed., 2d ed. 1836) ("A republic, where the people at large, either collectively or by representation, form the legislature.") (speech of Charles Pickney, S.C.); *cf. The Federalist* No. 71, at 483 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The tendency of the legislative authority to absorb every other, has been fully displayed and illustrated by examples . . . . In governments *purely* republican, this tendency is almost irresistible.") (emphasis added), then the Twenty-third Amendment's establishment of a right to a voice in the selection of the President and Vice-President, as distinguished from the national legislature, would be essentially outside the domain of the Guarantee Clause. So the Twenty-third Amendment may have been necessary because it provided a right to elect a President, not the Fourteenth Amendment guarantee of a republican form of government.

The plaintiffs' claims also cannot be dismissed out of hand on the basis of the failure of the several states to ratify a proposed constitutional amendment stating that the District would be treated as a State "for purposes of representation in

Congress." H.R.J. Res. 554, § 1, 95th Cong. (1978); *see* H.R. Rep. No. 95-886 (1978). The proposed amendment received the support of two-thirds of the members of the House and of the Senate, but was ratified by only 16 states—much fewer than the 38 required—during the period provided for ratification. *See* Kyvig, *supra*, at 420-25. Although the congressional proponents of the proposed amendment maintained that "[i]f the citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential," H.R. Rep. No. 95-886, at 4, a failed constitutional amendment does not alter the meaning of the Constitution, and the views of a failed amendment's congressional supporters have no well-established significance.

Plaintiffs theories are unique. They may well founder, for example, on the specific reference to "states" in the relevant constitutional clauses, the structure of the Constitution, or the Congress' exclusive legislative authority over the District of Columbia. The issues that they raise also may turn out to be non-justiciable political questions, even though the concept of justiciability is becoming murkier and murkier. *See United States House of Representatives v. United States Dep't of Commerce, et al.*, 11 F. Supp. 2d 76 (D.D.C. 1998). Nonetheless, the claims plaintiffs present are sufficiently tenable to justify reference of the case to a three-judge district court.

III

Finally, plaintiffs argue that this case "comes within the requirements of the . . . three-judge statute," and therefore satisfies the third prong of the *Police Officers Guild* standard. 369 F. Supp. at 548-49. That statute, to reiterate, calls for a three-judge court when a case challenges "the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). For the purpose of this statute, apportionment means the allocation of congressional districts "among units entitled to representation." *Black's Law Dictionary* 99 (6th ed. 1990). Defendants are correct that the District of Columbia is

not apportioned a congressional district under the current apportionment scheme. The District's exclusion from apportionment, however, does not mean necessarily that plaintiffs' case does not challenge the constitutionality of the apportionment of congressional districts. In fact, such exclusion, and plaintiffs' prayer for a declaration that the District cannot constitutionally be left out of the apportionment process, indicate that the core of plaintiffs' case is a challenge to the apportionment of congressional districts. It seems clear that an apportionment that, for example, allocated no representatives at all to Alaska could be challenged under § 2284(a). It would be odd if a plaintiff could invoke § 2284(a) where a state was allocated some fraction of the districts to which it were entitled, unless it were allocated no districts at all. Admittedly, it would not be *absurd* if § 2284(a) operated that way. The Constitution explicitly requires that "each state shall have at least one representative." Art. I, § 2, cl. That explicit constitutional directive might have prompted Congress to distinguish between an allocation of no representatives and any other allocation of too few districts. But the plain language of § 2284(a) does not reflect such a distinction. In fact, there is no evidence that Congress made that distinction. The case law that defendants invoke, *see, e.g.*, *City of Philadelphia v. Klutznick*, 503 F. Supp. 657, 658 (E.D. Pa. 1980) (denying application for three-judge court because "[n]o existing apportionment is challenged here"); *Federation of American Immigration Reform v. Klutznick*, 486 F. Supp. 564, 577 (D.D.C. 1980), does not prove otherwise. In *Philadelphia*, the city of brotherly love was not complaining about the number of congressional districts allocated to the Commonwealth of Pennsylvania or to the city; it was concerned about census practices that might affect a *future* allocation. The situation in *FAIR* was similar: the court concluded that plaintiffs were simply "challeng[ing] . . . census practices *potentially* affecting allocations of House members to states," 484 F. Supp. 577 (emphasis added), rather than an *existing* allocation. These plaintiffs, in contrast, do challenge their *existing* allocation of zero representatives.

Accordingly, the third prong of the *Police Officers Guild* standard is satisfied.

IV

Although the details of their arguments differ on some points, both sets of plaintiffs base their claims on equal protection and a guaranteed right to a republican form of government. The plaintiffs in *Alexander v. Daley* advance additional constitutional arguments. And the *Alexander* complaint, unlike the *Adams* complaint, maintains that the constitution entitled citizens of the District to voting representation in the United States Senate. Since the intersection of the two cases falls within the scope of 28 U.S.C. § 2284(a), it is not necessary to discuss the details of the additional theories of the *Alexander* plaintiffs at this time. *Cf.* 22 *Moore's Federal Practice* § 404.02[2][d][i] (3d ed. 1998) (noting three-judge court has discretion to retain jurisdiction of non three-judge claims).

For all the reasons discussed above, the Chief Judge of this Circuit is requested to assign two other judges to participate in hearing and determining the plaintiffs' complaints for injunctive and declaratory relief.

DATE: November 6, 1998

s/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Clifford Alexander, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civ. No. 98-2187
William M. Daley, in his official capacity as Secretary of Commerce, *et al.*,	)	(Three-Judge Court)
	)	
	)	
Defendants.	)	
	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Clifford Alexander, Clinton Allen, Mary Ellen Arnold, Percy Battle, Wesley Brown, Andrew Bryant, Bonnie Cain, William Calbert, Oswald Cameron, Richard Carr, Dwight Cropp, Edward Eckenhoff, George Gibbs, Sr., A. Janelle Goetcheus, Michele Hagans, John Hechinger, Dorothy Height, Jehu Hunter, O.V. Johnson, Brenda Jones, Richard Jones, Kenneth Katz, Joan Kennan, Marguerite Kelly, Patricia King, Joyce A. Ladner, Debra L. Lee, Robert Low, Anna Marsh, David McDonald, Richard Moe, Luci Murphy, Brenda S. Nixon, Vincent E. Reed, Brenda Lee Richardson, Clyde Richardson, Don E. Robinson, Albert J. Schmidt, Kathryn J. Schmidt, Betty Smalls, Lloyd D. Smith, Miles S. Steele, III, Henry Strong, H. Patrick Swygert, Hector Torres, Stephen Joel Trachtenberg, Walter Washington, Frank H.F. White, Roger Wilkins, Eddie N.

Williams, Ray Wilson, Joseph Wood, Willie V. Wood, Elizabeth Yancey, the individual plaintiffs in the above-named action, and the District of Columbia, also a plaintiff, hereby appeal to the Supreme Court of the United States from the final judgment of the three-judge court entered in this action on March 20, 2000.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

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May 18, 2000

CERTIFICATE OF SERVICE

I, Charles A. Miller, a member of the bar of the Supreme Court of the United States, hereby certify that on this 18th day of May, 2000, I have caused copies of the foregoing Notice of Appeal to be served on the following parties by first-class mail, postage prepaid:

Kerry Kircher
Deputy General Counsel
House of Representatives
United States House of Representatives
219 Cannon Building
Washington, D.C. 20515

Representing Defendants Robin H. Carle, as Clerk of the United States House of Representatives, James M. Eagen, III, as Chief Administrative Officer of the United States House of Representatives, and Wilson Livingood, as Sergeant at Arms of the United States House of Representatives

Thomas B. Griffith
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United States Senate
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Representing Defendants Gary Sisco, as Secretary of the United States Senate, and Gregory S. Casey, as Sergeant at Arms and Doorkeeper of the United States Senate

Seth Waxman
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

On behalf of Defendants the United States and William M. Daley, as Secretary of Commerce

--and--

William M. Daley
Secretary of Commerce
14th Street & Constitution Ave., N.W.
Washington, D.C. 20230

s/ Charles A. Miller

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Clifford Alexander, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civ. No. 98-2187
William M. Daley, in his official capacity as Secretary of Commerce, *et al.*,	)	(Three-Judge Court)
	)	
	)	
Defendants.	)	
	)	

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NATURE OF ACTION

This action seeks to secure for citizens of the District of Columbia the right to vote for members of the United States Congress--a precious right that has become a fundamental attribute of United States citizenship and that is enjoyed by all other adult citizens of the United States proper, but which has been withheld from citizens of the nation's capital for two centuries. We seek declaratory, and if necessary, injunctive relief to eliminate this affront to our nation's ideals, and to assure that as America enters a new millennium, and its third century as the beacon of freedom for the world, the citizens of the District of Columbia will have the right, in common with their fellow Americans across the land, to participate in the selection of the members of our governing legislature. By

securing this relief, the citizens of the District will at last achieve fulfillment of their birthright of full American citizenship.

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of the action under 28 U.S.C. § 1331 because plaintiffs' claims arise under the United States Constitution. Jurisdiction over Defendant Daley and the United States also lies under 5 U.S.C. §§ 701-706.

2. Venue is proper in this District under 28 U.S.C. §§ 1391(b)(1)-(2) and 1391(e)(1)-(3), because all plaintiffs and defendants reside in this District and because a substantial part of the events and omissions giving rise to the cause of action have occurred here.

PARTIES

A. Plaintiffs

3. The plaintiffs are a group of citizens who reside in various parts of the District, and the District of Columbia. The backgrounds, the occupations and experience, and the viewpoints of the individual plaintiffs are widely divergent. But they are united in their yearning to attain and exercise the right that is inherent in and fundamental to being an American citizen--the right of full participation in the process that elects those who make the laws that govern their lives. The names and identifying information about each of the individual plaintiffs are set forth in the following paragraphs.

4. Plaintiff Clifford Alexander, a resident of Ward 6, resides at 400 C Street, N.E., Washington, D.C. 20002. Mr. Alexander has served in numerous positions in the Executive Branch of the Federal government, including Secretary of the Army and Chair of the Equal Employment Opportunity Commission. He has operated a private business consulting firm for the past seventeen years, and is a member of numerous corporate boards. He has been a resident of the

District of Columbia since 1963. Prior to that time, as a resident of the State of New York, he participated in the election of members of the United States Congress. But since becoming a District citizen, Mr. Alexander has been unable to vote for members of the United States Congress.

5. Plaintiff Clinton Allen, a resident of Ward 5, resides at 2717 Seventeenth Street, N.E., Washington, D.C. 20018. Mr. Allen is a lifetime Washingtonian who served in the United States Army during World War II. He has worked as a plumber for more than half a century, and for the past fifteen years he and his sons have operated a small family plumbing business. Because he has been a District citizen all of his life, Mr. Allen has never been able to vote for members of the United States Congress.

6. Plaintiffs Annie C. Armstrong and McKinley Armstrong, residents of Ward 5, reside at 1346 Monroe Street, N.E., Washington, D.C. 20017. They have lived in Washington for 32 years. Before retirement, Mrs. Armstrong was a school librarian. Mr. Armstrong was a teacher and basketball coach at McKinley High School in Washington. Mr. and Mrs. Armstrong formerly resided in North Carolina and Virginia, where they participated in the election of members of the United States Congress. But since becoming District citizens, they have been unable to vote for members of the United States Congress.

7. Plaintiff Mary Ellen Arnold, a resident of Ward 4, resides at 5804 Eighth Street, N.W., Washington, D.C. 20011. She has lived in the District for over 30 years. Initially employed as a stenographer for the Defense Department, she pursued her education while working and secured a degree in education. She then taught in the public schools of the District for 23 years, at the junior and senior high school level. She next studied law, and for the past four years has held various legal positions, which have included work in family law and child abuse and neglect cases. While teaching high school, Ms. Arnold encouraged her students to participate in the political process and gave extra credit to

those who registered to vote. Yet neither those students (who have remained in the District) nor Ms. Arnold, who has been a District citizen during her adulthood, have been able to vote for members of the United States Congress.

8. Plaintiff Percy Battle, a resident of Ward 8, resides at 1129 Chicag Street, S.E., Washington, D.C. 20020-5804. He is a lifetime resident of the District. Mr. Battle served in the Navy during World War II, and worked thereafter as a fiscal officer for the State Department and in administrative positions for the District government. He was chairman of the Police and Firemen's Retirement and Relief Board. His many civic and community activities include positions with the Benevolent and Protective Order of Elks, the St. Vincent DePaul Society, Our Lady of Perpetual Help Church Parish Council, and several home and school associations. Because he has been a District citizen all of his life, Mr. Battle has never been able to vote for members of the United States Congress.

9. Plaintiff Wesley Brown, a resident of Ward 4, resides at 6101 Sixteenth Street, N.W., Washington, D.C. 20011. He is a native Washingtonian. A graduate of the United States Naval Academy with a degree in engineering, he served on active duty for 25 years. After his retirement, he served for several years in engineering positions with New York State agencies before returning to Washington, where he has provided similar services to Howard University for over 20 years. Mr. Brown's memberships include organizations devoted to naval history and to the Naval Academy. While living in New York, between 1970 and 1980, Mr. Brown participated in the election of members of Congress. But prior thereto, and since returning to Washington, Mr. Brown has been unable to vote for members of the United States Congress.

10. Plaintiff Andrew Bryant, a resident of Ward 4, resides at 8500 East Beach Drive, N.W., Washington, D.C. 20012. He is a lifetime resident of the District of Columbia. Following a two-year tour of duty in the United States Air

Force, he pursued a career as an architect and has won national renown for his work in that field. Mr. Bryant's civic involvements include service as president of the District of Columbia Chamber of Commerce and as a Board member of the Y.M.C.A. Because he has been a District citizen all of his life, Mr. Bryant has never been able to vote for members of the United States Congress.

11. Plaintiff Bonnie Cain, a resident of Ward 1, resides at 1753 Lamont Street, N.W., Washington, D.C. 20010. She owns and operates a communications business in the District. She has lived in Washington, D.C., for over 15 years. Prior thereto, she lived in Illinois and Massachusetts, where she participated in the election of members of the United States Congress. But since becoming a District citizen, she has been unable to vote for members of the United States Congress.

12. Plaintiff William Calbert, a resident of Ward 5, resides at 1261 Kearney Street, N.E., Washington, D.C. 20017. He spent a total of 20 years in the United States Army, serving during World War II in the United States and in Europe, in both the enlisted and Warrant Officer categories. Later, following college and seminary, Rev. Calbert re-entered the military service as an Army Chaplain, and served in this capacity in the United States, in Korea, and in Vietnam. His service also included a tour of duty on the Staff and Faculty of the U.S. Army Chaplain School. Since his retirement from the Army, his activities have included serving as Executive Director of a District anti-poverty agency, member of the Mayor's Health Planning Advisory Committee, Staff Chaplaincy at St. Elizabeth's Hospital, and Minister of Christian Education at the Shiloh Baptist Church. Rev. Calbert has been a District resident for 30 years. Prior thereto, he resided in California, where he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

13. Plaintiff Oswald I. Cameron, a resident of Ward 1, resides at 2728 Thirteenth Street, N.W., Washington, D.C. 20009. Dr. Cameron studied dentistry at Howard University, and maintains a dental practice in two locations in the District. He is also a leader in the Mount Pleasant Business Association. He has been a District resident for 11 years during which time he has been unable to vote for members of the United States Congress.

14. Plaintiff Richard Carr, a resident of Ward 2, resides at 4057 Highwood Court, N.W., Washington, D.C. 20016. Mr. Carr is a fifth generation Washingtonian who has resided in the District for the past 28 years. He is executive vice president of the Oliver Carr Company, a leading real estate development and management firm, and has had primary responsibility for the restoration and operation of the Willard Hotel. Because he has been a District citizen during his adulthood, he has been unable to vote for members of the United States Congress.

15. Plaintiff Dwight Cropp, a resident of Ward 4, resides at 4001 Eighteenth Street, N.W., Washington, D.C. 20011. After receiving an advanced degree from Howard University, Mr. Cropp taught social studies in the D.C. public schools for four years. He then began a career in D.C. government service in which he held a series of responsible executive positions over a 20-year period. During the past eight years, he has taught public administration at the George Washington University. He is a fourth generation Washingtonian. Because he has been a District citizen all of his life, Mr. Cropp has never been able to vote for members of the United States Congress.

16. Plaintiff Edward Eckenhoff, a resident of Ward 3, resides at 1658 35th Street, N.W., Washington, D.C. 20016. Mr. Eckenhoff is the founder and current President and CEO of the National Rehabilitation Hospital, one of the nation's leading rehabilitation facilities. He is also Vice President of the Medlantic Healthcare Group. He is active in many health-related organizations and community groups across the

country, including the Easter Seal Society. He has received numerous awards for his leadership in the health care field, including the AMA's Distinguished Service Citation, the highest award it bestows on non-physicians. Mr. Eckenhoff has lived in Washington since 1982. Prior thereto, he resided in Illinois, where he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

17. Plaintiff George Gibbs, a resident of Ward 7, resides at 1570 41st Street, S.E., Washington, D.C. 20020. Mr. Gibbs is a veteran of the United States Army, having served during the Korean War. For over 50 years before his retirement, he worked as a truck driver and a licensed taxi driver. He has lived in Washington for over 70 years. Because he has been a District resident all of his life, Mr. Gibbs has never been able to vote for members of the United States Congress.

18. Plaintiff Janelle A. Goetcheus, a resident of Ward 1, resides at 1717 Columbia Road, N.W., Washington, D.C. 20009. She is a physician who has lived in Washington for over 20 years. Dr. Goetcheus has devoted her career to helping homeless and indigent people. She founded the Columbia Road Health Services medical facility in 1979, and the Christ House facility for homeless men in 1985, where she and her family reside. Dr. Goetcheus is also medical director of Unity Health Care, Inc., which operates health facilities in 14 homeless shelters and a mobile van. Dr. Goetcheus has received many awards and honors, including being named Doctor of the Year by the American Academy of Family Physicians in 1991. Prior to moving to Washington, Dr. Goetcheus resided in Indiana, where she participated in the election of members of the United States Congress. But since becoming a District citizen, she has been unable to vote for members of the United States Congress.

19. Plaintiff Michele Hagans, a resident of Ward 4, resides at 1773 Verbena Street, N.W., Washington, D.C.

20015. Ms. Hagans holds masters degrees in engineering and business administration, and for 14 years has been president of Fort Lincoln New Town Corporation, a leading real estate development firm in the District. She is involved with and provides significant support to numerous civic and philanthropic organizations. Ms. Hagans is a native Washingtonian. Because she has been a District citizen all of her life, she has never been able to vote for members of the United States Congress.

20. Plaintiff John Hechinger, a resident of Ward 3, resides at 2838 Chain Bridge Road, N.W., Washington, D.C. 20016-3406. Mr. Hechinger is a fifth generation Washingtonian. He served in the United States Air Force in the China-Burma-India theater during World War II. He headed the Hechinger Company from 1958 until his retirement. In addition, Mr. Hechinger served as the first Chairman of the City Council of Washington, D.C., and as a United States delegate to the United Nations General Assembly. He has been a supporter of and an active participant in numerous civic and philanthropic organizations, including the United Way Fund, the Washington Urban League, the Boys Club of Washington, and Columbia Hospital for Women. Because he has been a District citizen all of his life, Mr. Hechinger has never been able to vote for members of the United States Congress.

21. Plaintiff Dorothy Height, a resident of Ward 2, resides at 700 Seventh Street, S.W., Apt. 614, Washington, D.C. 20024. Dr. Height served as president of the National Council for Negro Women for 41 years, and earlier this year became President Emerita. She also held leading positions in the Y.W.C.A. from 1937 to 1977, and represented the organization throughout the world. Dr. Height is the recipient of numerous awards and honors from governments and organizations, including the Citizens Medal Award conferred by President Reagan in 1989 and the Presidential Medal of Freedom conferred by President Clinton in 1994. Dr. Height holds honorary degrees from 24 institutions of higher learning.

Dr. Height has been a resident of the District for two years. Prior to that time, for over 60 years, as a resident of New York, she had an unbroken record of participation in elections for members of the United States Congress. But since becoming a District citizen, she has been unable to vote for members of the United States Congress.

22. Plaintiff Jehu Hunter, a resident of Ward 4, resides at 7822 Sixteenth Street, N.W., Washington, D.C. 20012. Following his graduation from Howard University with a degree in zoology, Mr. Hunter entered the United States Army and served with the 92d Infantry "Buffalo" Division during the Italian campaign of World War II, receiving the Bronze Star. After the war, he served in the Army Reserves, achieving the rank of Captain. Mr. Hunter pursued a career as a biologist at the National Institutes of Health, where he served for over 30 years in various staff positions, and an additional 10 years as a consultant. Among his honors were the NIH Award of Merit in 1977 for his work in advancing the Major Research Grant Program and the Sudden Infant Death Syndrome Research Initiative. Mr. Hunter is active in numerous civic organizations. Because he has been a District citizen all of his life, Mr. Hunter has never been able to vote for members of the United States Congress.

23. Plaintiff O.V. Johnson, a resident of Ward 8, resides at 632 Elmira Street, S.E., Washington, D.C. 20032. Mr. Johnson spent 20 years in the United States Air Force, serving in the Korean and Vietnam conflicts. Following his retirement, he served as a representative of disabled veterans for the District government for 20 years. Mr. Johnson has been active in civic affairs, particularly in school matters, and served for five years as chair of the Ballou local school board. Mr. Johnson has lived in Washington since 1966. Prior thereto, he was a resident of Illinois and Missouri, where he participated in the election of members of the United States Congress. Earlier, Mr. Johnson lived in Mississippi but because of his race was deprived of the right to vote based on laws and practices that have since been discarded. Since

becoming a District citizen, he has once again been unable to vote for members of the United States Congress.

24. Plaintiff Brenda Jones, a resident of Ward 8, resides at 158 Chesapeake Street, S.W., Washington, D.C. 20032. Ms. Jones is the founder and Executive Director of Parkland Community Center, which for the past 18 years has pursued the enhancement of the quality of life for disadvantaged families, through family preservation and strengthening programs. In addition, Ms. Jones is active in a wide range of community activities, and serves on the boards of a number of civic and business organizations. Because she has been a District citizen all of her life, Ms. Jones has never been able to vote for members of the United States Congress.

25. Plaintiff Richard E. Jones, a resident of Ward 3, resides at 2832 28th Street, N.W., Washington, D.C. 20008. Mr. Jones served in the United States Air Force during World War II and was decorated as a combat pilot. He remained in the Air Force until 1955. Thereafter, he worked in the aerospace industry until 1976, and subsequently in the United States Department of Energy. Mr. Jones has lived in the District for 31 years. Prior thereto, he was a resident of Texas and Virginia, where he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

26. Plaintiff Kenneth Katz, a resident of Ward 3, resides at 3411 Fessenden Street, N.W., Washington, D.C. 20008. Dr. Katz works at the National Center for Biotechnology Information, part of the National Institutes of Health. Dr. Katz contributes to building, maintaining, and making freely accessible to the public, databases for various types of biological data, such as sequences of human genes. Dr. Katz received a Five-College Ph.D. in Molecular Biology from the University of Massachusetts and Amherst College in 1990. Prior to residing in the District, Dr. Katz resided in Pennsylvania, Massachusetts, and California where he voted for members of the United States Congress. Since coming to

the District, Dr. Katz has been unable to vote for members of the United States Congress, although Dr. Katz' colleagues at NIH who live within the NIH federal enclave are able to vote for members of the United States Congress.

27. Plaintiff Joan Keenan, a resident of Ward 6, resides at 115 Sixth Street, S.E., Washington, D.C. 20003. Ms. Keenan has a master's degree in library work with children, and has worked as a children's librarian in the District of Columbia Public Library, as well as in public and private schools. She was a founder of the Capitol Hill Montessori School, and is active in numerous community and civic organizations. She has lived in the District since 1951, and from that time to the present she has been unable to vote for members of the United States Congress.

28. Plaintiff Marguerite Kelly, a resident of Ward 6, resides at 420 Constitution Avenue, N.E., Washington, D.C. 20002. Ms. Kelly is an author and journalist, and writes a syndicated column on family issues for a number of newspapers. She has published a series of books on child care and family matters. She also served for many years on the Boards of the District of Columbia Public Library and of Friendship House, and has been an active volunteer in civic and political affairs since she was 18. Ms. Kelly has lived in Washington since 1953, and from that time to the present she has been unable to vote for members of the United States Congress.

29. Plaintiff Patricia King, a resident of Ward 2, resides at 1253 Fourth Street, S.W., Washington, D.C. 20024. Ms. King served as Deputy Director of the Office for Civil Rights in the Department of Health, Education and Welfare and as special assistant to the Chair of the Equal Employment Opportunity Commission during the Nixon Administration, and as Deputy Assistant Attorney General in the Carter Administration. She has been a professor of law at Georgetown University since 1974 and is a highly respected scholar in the fields of ethics, medicine and public policy. Ms. King has lived in the District since 1969, and from that time to

the present she has been unable to vote for members of the United States Congress.

30. Plaintiff Joyce Ladner, a resident of Ward 3, resides at 3168 Upland Terrace, N.W., Washington, D.C. 20015. Dr. Ladner was raised in Mississippi, where she participated in movements to secure voting rights for minorities. She is a nationally known scholar in the field of sociology. She has taught sociology at several institutions, including Howard University, and also served in the administration of Howard as Vice President for Academic Affairs and as Interim President. From 1995-1998, she served on the District's Financial Responsibility and Management Assistance Authority. Dr. Ladner is a member of numerous educational and civic organizations. She currently is a Senior Fellow at the Brookings Institution. Dr. Ladner has lived in Washington continuously since 1981. Prior thereto, she resided in New York where she participated in the election of members of the United States Congress. But since becoming a District citizen, she has been unable to vote for members of the United States Congress.

31. Plaintiff Debra L. Lee, a resident of Ward 3, resides at 4668 Broad Branch Road, N.W., Washington, D.C. 20008. Ms. Lee has had a distinguished career in the telecommunications industry, and currently serves as president and chief operating officer of BET Holdings, Inc., a multi-media entertainment corporation. She is affiliated with a number of professional and civic organizations, including the Kennedy Center's Community Board. Ms. Lee lived in Washington from 1980 to 1989 and returned to the City in 1995. In the interim, she resided in Maryland, where she participated in the election of members of the United States Congress. But during 1980-89 and since returning to the District, she has been unable to vote for members of the United States Congress.

32. Plaintiff Robert Low, a resident of Ward 1, resides at 1827 Park Road, N.W., Washington, D.C. 20010. From 1966 to 1969, Mr. Low served as an officer in the

United States Army. He is a certified public accountant and has been practicing accountancy from his offices in the District since 1974. For 15 years, Mr. Low has been a member of the Board of the D.C. Preservation League. Mr. Low has lived in Washington for 28 years. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

33. Plaintiff Anna Marsh, a resident of Ward 2, resides at 1253 Delaware Avenue, S.W., Washington, D.C. 20024. Ms. Marsh served with the public schools for many years, and with the Federal government as a statistician and geographer. She has been extremely active in civic and church activities. She has been an active member of the League of Women Voters since 1979 and has served as its president. Because she has been a District citizen all of her life, Ms. Marsh has never been able to vote for members of the United States Congress.

34. Plaintiff David McDonald, a resident of Ward 1, resides at 1807 Monroe Street, N.W., Washington, D.C. 20010. Captain McDonald is a 19-year veteran of the Metropolitan Police Department. Captain McDonald served in the United States Army before joining the police force. He has recently moved to the District, after having lived in Maryland, where he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

35. Plaintiff Richard Moe, a resident of Ward 3, resides at 3321 Garfield Street, N.W., Washington, D.C. 20008. Mr. Moe served on the staff of Senator Walter F. Mondale, and later as chief of staff to Vice President Mondale. He is a committed preservationist and in 1993 assumed the presidency of the National Trust for Historic Preservation. Mr. Moe has lived in Washington since 1972. Prior thereto, he lived in Maryland, where he participated in the election of members of the United States Congress. But since becoming a

District citizen, he has been unable to vote for members of the United States Congress.

36. Plaintiff Luci Murphy, a resident of Ward 1, resides at 1449 Oak Street, N.W., Washington, D.C. 20010. Ms. Murphy has been active in numerous civic organizations, including especially the League of Women Voters, and she currently serves as president of the District of Columbia chapter of that organization. Ms. Murphy is also a talented singer, and has for many years engaged in performance, both in solo and ensemble settings, of blues, jazz, spiritual and folk music in a variety of languages. For some years, Ms. Murphy lived in the State of Washington, where she participated in the election of members of the United States Congress. But while she has lived in the District, Ms. Murphy has never been able to vote for members of the United States Congress.

37. Plaintiff Brenda Nixon, a resident of Ward 4, resides at 8226 West Beach Drive, N.W., Washington, D.C. 20012. Ms. Nixon is a professional educator, and since 1975 has been the Executive Director of Associates for Renewal in Education, a non-profit organization dedicated to enhancement of teaching and educational opportunities for children and youth. She is a participant in numerous civic organizations and the recipient of many honors and awards for her community betterment efforts. Ms. Nixon has been a District resident since 1990. Before that time, she resided in New York and Maryland, where she participated in the election of members of the United States Congress. But since becoming a District citizen, she has been unable to vote for members of the United States Congress.

38. Plaintiff Louise Perry, a resident of Ward 4, resides at 1445 Primrose Road, N.W., Washington, D.C. 20012. Ms. Perry has an advanced degree in Operating Room Supervision and served as a consultant in establishing new hospitals. She is also active in civic affairs, and has devoted significant time, among other organizations, to the Girl Scouts and the League of Women Voters, as well as the Foundry United Methodist Church and its efforts to secure voting

representation for District citizens. Ms. Perry has lived in Washington since 1958. Prior thereto, she resided in Connecticut where she participated in the election of members of the United States Congress. But since becoming a District citizen, she has been unable to vote for members of the United States Congress.

39. Plaintiff Vincent Reed, a resident of Ward 4, resides at 7115 Sixteenth Street, N.W., Washington, D.C. 20012. Mr. Reed has had a distinguished career as an educator, serving in the District's public school system as a teacher, counselor and principal, as assistant superintendent for various functions, and as superintendent of the system from 1976 to 1981. After retiring from the school system, Mr. Reed served as Assistant Secretary of Education in the Reagan Administration. He joined the Washington Post Company in 1982 and was Vice President of Communications until his retirement earlier this year. Mr. Reed has been a Washington resident since 1956. Prior thereto, Mr. Reed was a resident of West Virginia where he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

40. Plaintiff Brenda Richardson, a resident of Ward 8, resides at 3008 24th Place, S.E., Washington, D.C. 20020. Ms. Richardson is president of Women Like Us, a consulting firm specializing in counseling, training and private/public partnership building for personal and community development, particularly as regards women and children. Her work also involves developing projects designed to enhance individual responsibility and self-sufficiency, including projects that assist citizens to transition from welfare to work. Ms. Richardson moved to Washington at age 12 and has lived in Washington for 20 years. Since becoming a District citizen, she has been unable to vote for members of the United States Congress.

41. Plaintiff Clyde Richardson, a resident of Ward 5, resides at 1621 Crittenden Street, N.E., Washington, D.C.

20017. Mr. Richardson served in the United States Army, and later as a management analyst with the Departments of the Air Force and Army. He completed his Federal service with the Bureau of Labor Statistics. He has been a leader in civic and charitable activities, and he has been especially active in work with the Christian Relief Services, Africare and the United Way. Mr. Richardson has been a District resident for approximately 30 years. Prior thereto, he was a citizen of North Carolina where he participated in the election of members of the United States Congress. But since becoming a District resident, Mr. Richardson has been unable to vote for members of the United States Congress.

42. Plaintiff Don E. Robinson, a resident of Ward 5, resides at 51 Que Street, N.W., Washington, D.C. 20001. Reverend Robinson is an ordained Unitarian Universalist Minister. He served in the United States Army as an infantry officer from 1963 to 1965. In Washington he has taught in the public schools and in the Receiving Home for Children (a juvenile institution), and he has served as a Community Youth Counselor in several inner cities. In 1990, he founded Beacon House Community Ministry, Inc., focusing on social services to all age groups with a primary concern for children. Reverend Robinson has lived in the District since 1965. Before coming here, he lived in West Virginia, where he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

43. Plaintiffs Albert J. and Kathryn J. Schmidt, residents of Ward 1, reside at 1614 Hobart Street, N.W., Washington, D.C. 20009. Dr. Schmidt is a World War II veteran, having served in the South Pacific campaigns. Thereafter, he pursued a career as a professor of history. The Schmidts have been active in civic affairs since moving to Washington. Mrs. Schmidt's activities have included volunteer work in the Old Executive Office Building and as a librarian at the Woodrow Wilson High School, the Textile Museum and the National Archives. Dr. Schmidt is a docent

at the National Portrait Gallery and at historic Washington homes. Dr. and Mrs. Schmidt have been District residents since 1990. Prior thereto, they resided together in Iowa and Connecticut, before which Dr. Schmidt resided in Kentucky and Mrs. Schmidt resided in Ohio, where they participated in the election of members of the United States Congress. But since becoming District citizens, they have been unable to vote for members of the United States Congress.

44. Plaintiff Betty Smalls, a resident of Ward 6, resides at 312 Tennessee Avenue, N.E., Washington, D.C. 20002. Ms. Smalls is an educator who has taught in the D.C. public schools and has promoted educational enhancement activities for public school students, such as tutoring and special programs for gifted and talented youngsters. She is also active in a wide range of civic activities. Among other things, she has served on the District of Columbia Public Library Board of Trustees, and was a founder of the Friends of the Northeast Library. Because she has been a District citizen all of her life, Ms. Smalls has never been able to vote for members of the United States Congress.

45. Plaintiff Lloyd D. Smith, a resident of Ward 7, resides at 3642 Highwood Drive, S.E., Washington, D.C. 20019. Mr. Smith is the President and CEO of Marshall Heights Community Development Organization, which has received national and international recognition for its community and economic development activities. Before taking on this task, Mr. Smith had a 27-year career in Federal and District government service. He is currently involved in numerous civic projects and organizations, including the establishment of the Community First Bank, whose Board he chairs. Mr. Smith has received numerous awards for his community development work, which has been studied by government and private visitors from throughout the world. Mr. Smith has been a District resident for 62 years. Because he has been a District citizen for his entire adulthood, Mr. Smith has never been able to vote for members of the United States Congress.

46. Plaintiff Miles Steele, III, a resident of Ward 7, resides at 2625 36th Street, S.E., Washington, D.C. 20020. Mr. Steele devoted his working career to the automotive industry. Since his retirement and move to Washington, he has become actively involved in a number of civic organizations, including the Marshall Heights Community Development Organization. Mr. Steele has lived in the District since 1994. Prior to that time, he resided in California, where he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

47. Plaintiff Henry Strong, a resident of Ward 3, resides at 5039 Overlook Road, N.W., Washington, D.C. 20016. Mr. Strong served in the United States Navy for three years as a Naval aviator during World War II. He was in the Foreign Service from 1950 to 1968, during which time he served in several American embassies abroad. Since 1968, he has been Chairman and President of the Hattie M. Strong Foundation, which has provided grants to many worthwhile causes. Mr. Strong's extensive involvement in civic and philanthropic affairs includes board or trustee positions with the Kennedy Center, the National Symphony Orchestra, Mt. Vernon College and the D.C. Board of Higher Education. Mr. Strong has been a Washingtonian for over 60 years. Because he has been a District citizen for his entire adulthood, Mr. Strong has never been able to vote for members of the United States Congress.

48. Plaintiff H. Patrick Swygert, a resident of Ward 3, resides at 3119 Arizona Avenue, N.W., Washington, D.C. 20016. Mr. Swygert has had a distinguished career in academia, including visiting professorships abroad as well as faculty and administrative positions in highly reputed American institutions, and has received numerous awards for his achievements in the educational field. He has held several government positions, and he is active in District civic organizations. Mr. Swygert has lived in Washington since

1995, when he became the 15th President of Howard University. Previously, Mr. Swygert lived in Pennsylvania and New York, where he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

49. Plaintiff Hector Torres, a resident of Ward 2, resides at 509 H Street, S.W., Washington, D.C. 20024. Mr. Torres is an executive in the hotel management business. He is also involved in a number of civic organizations, including substantial work on behalf of the Whitman-Walker Clinic. Mr. Torres has been a District resident for 19 years. Prior thereto, he lived in New York, where he participated in the election of members of the United States Congress. But since becoming a District citizen, Mr. Torres has been unable to vote for members of the United States Congress.

50. Plaintiff Stephen Joel Trachtenberg, a resident of Ward 1, resides at 2241 Bancroft Place, N.W., Washington, D.C. 20008. He has lived continuously in Washington since 1988, when he returned here to assume the presidency of The George Washington University. Mr. Trachtenberg has been recognized for his publications in academic journals and national media, and is the recipient of a number of honorary degrees. Mr. Trachtenberg lived here previously while holding various education positions in the Johnson Administration. After that service, he held academic positions at universities in Connecticut and Massachusetts. While there, he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

51. Plaintiff Walter Washington, a resident of Ward 1, resides at 408 T Street, N.W., Washington, D.C. 20001. Mayor Washington is a veteran public servant, housing expert, public administrator and civic leader. From 1967 to 1975, he served as Mayor-Commissioner, appointed by President Johnson and reappointed by President Nixon, and from 1975 to 1979 served as the first elected Mayor of the

District of Columbia. Prior thereto, Mayor Washington served with the National Capital Housing Authority, and was named its Director by President Kennedy in 1961. In 1966 and 1967, he chaired the Housing Authority of New York City, serving in the cabinet of Mayor John Lindsey. In addition to his public service, Mayor Washington has been involved with numerous worthy causes and organizations, most especially the Boy Scouts of America, Big Brothers of America, and the Kennedy Center. Mayor Washington has received numerous awards and honors for his exemplary public service and work on behalf of worthy organizations, including Doctor of Law degrees from numerous leading universities. He has served on several Boards of public companies. Mayor Washington has been a Washington resident for over half a century. Because he has been a District resident for virtually his entire adulthood, Mayor Washington has never been able to vote for members of the United States Congress.

52. Plaintiff Frank H.F. White, a resident of Ward 1, resides at 2234 California Street, N.W., Washington, D.C. 20008. Mr. White served in the United States Army during World War II, and saw duty in the Pacific theater. Thereafter, he had a career of 30 years with the Veterans Administration, where his duties included counseling disabled veterans. Mr. White has been a District resident for 30 years. Prior thereto, he was a resident of the State of Washington, where he participated in the election of members of the United States Congress, even during periods when he was posted overseas. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

53. Plaintiff Roger Wilkins, a resident of Ward 2, resides at 1253 Fourth Street, S.W., Washington, D.C. 20024. Mr. Wilkins served as Director of the United States Community Relations Service during the Johnson Administration, and had a distinguished journalism career during which he wrote for the New York Times and the Washington Post. He is a Pulitzer Prize winner and past chair of the Pulitzer Prize Board. He teaches history and American

culture at George Mason University, and is active in numerous civic organizations, including the NAACP Legal Defense Fund and the Africa-America Institute. Mr. Wilkins has been a District resident for the better part of the last 36 years. He has also resided in New York and Michigan where he participated in the election of members of the United States Congress. But while he has been a District citizen, Mr. Wilkins has been unable to vote for members of the United States Congress.

54. Plaintiff Eddie N. Williams, a resident of Ward 3, resides at 3126 Arizona Avenue, N.W., Washington, D.C. 20016. Mr. Williams has been a District resident continuously since 1972, when he assumed the Presidency of the Joint Center for Political and Economic Studies, a position he continues to hold. Among other topics, the Joint Center has played a leading role in the extension and implementation of equal voting rights throughout the country. Mr. Williams has been widely recognized for his work to improve conditions for African-Americans and other minorities. He sits on the boards of many prestigious organizations, including the Y.M.C.A. of the National Capital Area and Riggs National Corporation. Before coming to the District Mr. Williams was a resident of Illinois, where he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

55. Plaintiff Ray Wilson, a resident of Ward 5, resides at 524 Hamilton Street, N.E., Washington, D.C. 20011. Mr. Wilson served in the United States Navy from 1955 to 1974, including time on a destroyer in the Vietnam War, and earned the Active Combat Ribbon, the Gallantry Award, and Gold Hash Marks signifying twenty years of good service in the Navy. He also served four years on the U.S.S. Constitution. Since retirement from the Navy, Mr. Wilson has worked for the American Heart Association and the Urban League, and is currently a free lance photographer, exhibiting his work at the Lamond-Riggs library. Mr. Wilson has lived

in Washington his entire life, except when he was on military duty. Because he has been a District citizen all of his life, Mr. Wilson has never been able to vote for members of the United States Congress.

56. Plaintiff Joseph Wood, a resident of Ward 1, resides at 1722-1/2 Lamont Street, N.W., Washington, D.C. 20010. Mr. Wood is a carpenter, and plans to continue the pursuit of his trade in the District of Columbia. He has been a resident of the District for three years, having moved here from Maryland, where he participated in the election of members of the United States Congress. But since becoming a District citizen, he has been unable to vote for members of the United States Congress.

57. Plaintiff Willie V. Wood, a resident of Ward 4, resides at 7941 Sixteenth Street, N.W., Washington, D.C. 20012. Mr. Wood played professional football for the Green Bay Packers between 1960 and 1971, achieving widespread recognition during his twelve-year career, and admission to the Pro Football Hall of Fame in 1989. Following his playing career, he coached for ten years in the National Football League, the World Football League and the Canadian League. Since retiring from professional football, Mr. Wood has operated a mechanical contracting business in the District. He has also devoted himself to assisting youth, primarily by serving on the Board and devoting significant time to the Metropolitan Police Boys and Girls Club. Because he has been a District citizen all of his life, Mr. Wood has never been able to vote for members of the United States Congress.

58. Plaintiff Elizabeth Yancey, a resident of Ward 4, resides at 1762 Redwood Terrace, N.W., Washington, D.C. 20012. Ms. Yancey has advanced degrees in education, and pursued a career as a teacher, counselor and administrator in the D.C. public schools. Thereafter, she served as a program officer for race equality at American University until retiring in 1983. She continues to remain active as an educational consultant and Board member of the Reginald S. Lourie Center and as an active member of the League of Women

Voters. Because she has been a District citizen all of her life, Ms. Yancey has never been able to vote for members of the United States Congress.

59. All of the individual Plaintiffs are United States citizens registered to vote in the District of Columbia.

60. Plaintiff District of Columbia is a municipal corporation, created by Congress as the government of the District of Columbia. The chief executive officer of the municipal corporation, the Mayor, is elected by the citizens of the District of Columbia. Because citizens of the District are unable to vote for members of the United States Congress, plaintiff District of Columbia is the only governmental entity in which the citizens of the District have voting representation and which is accountable to them. The District of Columbia executes laws of both local and national application enacted by the Congress. Plaintiff District of Columbia brings this action on behalf of itself and all of the citizens of the District of Columbia not individually represented in this lawsuit.

B. Defendants

61. Defendant William M. Daley is Secretary of Commerce and is named here in his official capacity. In that capacity, Mr. Daley has ultimate responsibility for conducting the decennial census mandated in the United States Constitution, Article I, Section 2, and for reporting the resulting census data to the President of the United States for purposes of apportioning seats in the United States House of Representatives. *See* 13 U.S.C. § 141. Mr. Daley maintains his office at, and conducts his official duties from, the Department of Commerce in Washington, D.C.

62. Defendant Robin H. Carle is the Clerk of the United States House of Representatives and is named here in her official capacity. The Clerk of the House is responsible for sending to each state, following the decennial census, a certificate stating the number of members of the United States House of Representatives to which each state is entitled. *See* 2 U.S.C. § 2a(b). The Clerk is also responsible for compiling

the Roll of Members-Elect at the commencement of each Session of the House, for certifying the passage of Bills and Resolutions in the House, and for keeping an official record of the swearing in of Members. *See* 2 U.S.C. §§ 25, 26; House Rule III; Jefferson's Manual §§ 198, 638. The Clerk maintains her office in, and conducts her official duties from, the United States Capitol Building in Washington, D.C.

63. Defendant Wilson Livingood is the Sergeant-at-Arms of the United States House of Representatives and is named here in his official capacity. The House Sergeant at Arms is responsible for controlling admission to the Hall of the House and the House Floor. *See* 2 House Rule IV §§ 3, 4; House Rule XXXII; *see also* 2 U.S.C. § 78. In addition, the House Sergeant at Arms and the Senate Sergeant at Arms together make up a majority of the three-member Capitol Police Board, to which the Capitol Police are responsible. *See* 40 U.S.C. § 212a. The House Sergeant at Arms maintains his office at, and conducts his official duties from, the United States Capitol Building in Washington, D.C.

63A. Defendant James M. Eagan, III, is the Chief Administrative Officer of the House of Representatives. The House Chief Administrative Officer pays the salaries of members of the House. 2 U.S.C. § 80. The House Chief Administrative Officer maintains his office at, and conducts his official duties from, the United States Capitol Building in Washington, D.C.

64. Defendant Gary Sisco is the Secretary of the United States Senate and is named here in his official capacity. The Secretary of the Senate is responsible for paying salaries to United States Senators, for recording the certificates of election of Senators, and for sending to the governor and secretary of state of each state with an upcoming senatorial election, or with a senatorial vacancy, model certificates of election to the United States Senate. *See* 2 U.S.C. § 60c-1; Standing Rules of Senate Rule II. Mr. Sisco maintains his office at, and conducts his official duties from, the United States Capitol Building in Washington, D.C.

65. Defendant Gregory S. Casey is the Sergeant-at-Arms and Doorkeeper of the United States Senate, and is named here in his official capacity. The Sergeant at Arms and Doorkeeper is responsible for controlling access to the Senate floor, chamber, and galleries. Mr. Casey maintains his office in, and conducts his official duties from, the United States Capitol Building in Washington, D.C.

PRINCIPLES, FACTS AND HISTORY RELEVANT TO THE CLAIMS

A. Attributes of District Citizens

66. The individual plaintiffs are representative of more than 500,000 citizens of the United States who reside in and are also citizens of the District of Columbia. Currently, over 400,000 of these citizens are aged 18 or above.

67. Citizens in a democracy have both rights and obligations that attach to their citizenship. Among the key attributes of citizenship is the obligation of supporting the government, which is manifested principally by paying taxes, by serving, when called upon to do so, in the nation's defense in time of conflict, and by participating in the nation's political processes through the exercise of the franchise. Another responsibility of citizenship is to obey the laws duly adopted by the legislative bodies elected by the body politic.

68. Citizens of the District of Columbia have traditionally fulfilled and continue to fulfill their responsibilities of citizenship, and they have supported and continue to support their national government, often to a greater degree than citizens of most of the states.

69. District residents are among the highest payers of taxes to the federal government. In 1997, District citizens paid over two billion dollars in federal taxes. On a per capita basis, District citizens pay 40 percent more taxes to the federal government than the citizens of the nation as a whole. On a

per capita basis, District citizens pay more federal taxes than do the citizens of 49 states of the Union.

70. In addition to their heavy federal tax burden, citizens of the District pay more local taxes per capita to the District government than the citizens of 48 states of the Union pay to their states.

71. The tax burden on District citizens is among the highest in the nation even taking into account the income level of District citizens compared to citizens of the 50 states. The total tax burden on District citizens, per capita, is a greater percentage of income than for citizens in 49 states of the union. Considering federal taxes only, District citizens pay a higher percentage of their income in federal taxes than do the citizens of 40 states.

72. District citizens have also discharged faithfully their obligations to serve the nation in time of conflict. Throughout this century--from World War I, World War II, the Korean Conflict, and the Vietnam Conflict to the Persian Gulf war, the District provided more participants in the Armed Forces than did many other states, including states with larger populations at the time than the District.

73. In the most recent conflict, the Persian Gulf war, the rate of participation as Armed Forces personnel was greater for citizens of the District than for the nation as a whole.

74. As of 1994, over 50,000 residents of the District of Columbia were veterans who had served in the United States Armed Forces during one or more conflicts.

75. Over 1,600 citizens of the District of Columbia have given their lives in the defense of the nation during conflicts in this century.

76. Another obligation of citizenship is to participate in the election of government officials. Despite not being able to vote for members of the United States Congress, District residents often discharge this obligation in greater

number than do the citizens of the nation as a whole. In 1994, 67.5 percent of eligible District citizens were registered to vote, compared to 62.5 percent for the nation as a whole. In that year, 56.1 percent of the eligible residents voted, compared to 45 percent for the nation as a whole.

77. Thus, to the extent that achieving the right to vote is related to the fulfillment of the major obligations of United States citizenship, District citizens are as entitled as any group of Americans to vote, based on their impressive discharge of the obligations of United States citizenship.

B. The Right to Vote As The Fundamental Component of United States Citizenship

78. From the time of its creation as an independent nation, the United States has stood for the "self-evident" truth, proclaimed in the Declaration of Independence, that governments "deriv[e] their just Powers from the consent of the Governed." That consent is reflected in the right to participate in the selection of those who make the laws that govern the nation, a fundamental article of republican government and a hallmark of democracy.

79. In the ensuing two centuries, this concept of government by the consent of the governed has been enlarged and perfected to embody a principle of universal suffrage applicable to all holders of national elected office, so that today the right of all adult citizens to participate equally in the process of government through exercise of the power to vote for President and Vice President, and for Senators and Representatives in Congress, has become a fundamental tenet of our political system, deeply ingrained in the nation's constitutional process.

80. Realization of the ideal of universal suffrage applicable to all national office holders has been accomplished through a combination of events involving all branches of the federal government. The role of the judiciary in this evolution has been crucial.

81. At the time the Constitution was adopted, only a narrow minority of the population of the states was entitled to vote. Each state established its own voting requirements, and the Constitution looked to state requirements to determine the qualifications for voting for members of the House of Representatives. Moreover, only Representatives were to be elected directly by the people. Senators were to be selected by state legislatures. The President and Vice President were to be chosen by electors, who were to be selected in each state in the manner provided for by that state's legislature.

82. At this time, most states had a property ownership requirement as a qualification for voting, and almost all states limited the right to vote to men. Other common requirements included the payment of taxes and residency in the state for a specified period. In many states, voting was limited to "freemen," meaning that those in bondage were not entitled to vote.

83. In the years leading up to the Civil War, some states liberalized their voting qualifications to a degree, and newly admitted states generally utilized somewhat more liberal qualifications than those of the original states. Still, voting was generally confined to white males, and in some cases to taxpaying white males.

84. In the aftermath of the Civil War, the 14th and 15th Amendments were ratified. The 14th Amendment, among other things, penalized states by reducing their representation in the House of Representatives to the extent that the right of male adult citizens to vote was denied or abridged in any way, except for participation in rebellion or other crime. The 15th Amendment prohibited denial or abridgement of the right to vote of any citizen based on race, color or previous condition of servitude.

85. Notwithstanding these amendments, in many states non-white citizens were prevented or discouraged from voting by various devices, including poll taxes, literacy tests, and understanding tests.

86. These barriers to the franchise were eventually eliminated, primarily through judicial decisions, in many cases notwithstanding earlier decisions upholding the same or similar practices. Thus, between 1910 and 1970, as a result of Supreme Court decisions, "grandfather clauses," white primary laws, property requirements, lengthy residency requirements and poll taxes were all struck down as unconstitutional. Poll taxes were also barred in federal elections by the 24th Amendment. Literacy and understanding tests were effectively eliminated by Congressional action.

87. The selection of members of the United States Senate by state legislatures, as provided for originally in the Constitution, was consistent with the "consent of the governed" principle only in the sense that state legislatures were made up of members elected by qualified voters in the states. There was much advocacy throughout the 19th and early 20th centuries of direct election of Senators. Finally, Congress proposed the 17th Amendment to the Constitution providing for direct election of Senators by the people of each state. The proposal was ratified by the requisite number of states and became part of the Constitution in 1913.

88. For many decades, efforts were undertaken to achieve the right to vote for women. In the latter half of the 19th century and in the early years of the 20th century, certain states did by legislation or constitutional amendment confer the right to vote on women. Ultimately, the 19th Amendment to the Constitution, prohibiting denial or abridgement of the right to vote on account of sex, became part of the Constitution in 1920, thus guaranteeing women the right to vote in federal and state elections.

89. The Supreme Court has also invalidated restrictions on participation in elections by persons residing on federal enclaves, holding such restrictions to be unconstitutional in a 1970 decision. The Congress has enacted legislation to secure the right of citizens living abroad to vote in elections for federal officials, including members of Congress. The legislation covers members of the Armed

Forces and civilians living abroad, including citizens having no intention to return to the United States. The Supreme Court has struck down as unconstitutional state laws that exclude members of the Armed Forces from participating in local elections.

90. In a series of legislative enactments beginning in 1957 and culminating in the Voting Rights Act of 1965, Congress adopted a wide range of laws to ensure implementation and protection of the constitutional rights of all citizens to vote.

91. The 26th Amendment to the Constitution, adopted in 1972, prohibits denial or abridgment of the right to vote on account of age of any United States citizen age 18 or older. The amendment was justified primarily on the basis that those old enough to serve in the nation's Armed Forces were old enough to be guaranteed the right to vote.

92. Beginning in the 1960s, judicial decisions established and implemented the "one person, one vote" principle, which has been applied to eliminate disparities in the size of voting districts for congressional seats within states as well as for state legislative seats. This principle, in conjunction with the emergence of universal suffrage and direct election of Senators, has resulted in a political system that to the greatest extent possible assures all voting age citizens (except for those residing in the District of Columbia) an effective vote in the selection of members of the United States Congress (as well as members of state legislatures).

93. The right of all voting age citizens to vote in the selection of members of the United States Congress has become a fundamental attribute of United States citizenship, established through judicial decisions as well as by constitutional amendments and Acts of Congress, and protected by the Constitution as well as Acts of Congress.

C. The Position of the District In The Constitutional Structure

94. Article I, Section 8, Clause 17, of the Constitution, referred to as the "District Clause,"authorizes the Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . ."

95. Neither in the District Clause nor elsewhere does the Constitution provide that citizens of the District to be created pursuant to that Clause should not possess rights of United States citizenship, including the right to vote for members of the United States Congress, to the same extent as citizens of the several states. Nor is it essential to, helpful to, or consistent with the Constitutional structure that District citizens not have voting rights for members of the United States Congress to the same extent as their fellow citizens who reside in the various states, including residents of federal enclaves and citizens living abroad.

96. The participants in the Constitutional Convention of 1787 adopted a District Clause because they wanted the national capital not to be under the control of any one state. They did not intend to deprive citizens of the capital district of any rights, including voting rights, that they would possess as residents of one of the states of the union.

97. The original capital district was created from lands ceded to the national government by the states of Maryland and Virginia. Maryland made its cessions in 1788, 1791, 1792 and 1793. Virginia made its cession in 1789. Congress accepted the ceded territory under the District Clause of the Constitution by statutes enacted in 1790 and 1791. By statute enacted in 1790, Congress determined that the seat of government would be relocated to the District of Columbia on December 1, 1800.

98. Notwithstanding the cessions to and acceptance by the federal government of the land comprising the District of Columbia, citizens of the District continued to vote in national elections in Maryland and Virginia, respectively, through the national election of 1800.

99. The laws of Maryland and Virginia pertaining to qualifications of voters during this period limited the right to vote to freemen above the age of 21 who were freehold owners of specified amounts of property. Historical records indicate that as of 1800, there were fewer than 5,000 citizens of the District who were qualified to vote, and perhaps as few as several hundred.

100. In 1846, the Virginia portion of the District was retroceded to Virginia, and ceased to be a part of the District of Columbia.

D. Congress As The Supreme Legislature For The District of Columbia

101. When Congress enacts legislation affecting the nation as a whole, it applies such legislation to the District of Columbia and its citizens in the same manner and to the same extent as to the citizens of the states. Accordingly, the District and its citizens are subject to federal laws relating to taxes, crime, military service, health care, employment, welfare, the environment, education, housing, business regulation and other areas to the same extent as are the states and their citizens.

102. In addition, pursuant to its power under the District Clause, Congress possesses and exercises ultimate legislative authority over the District with respect to matters that are particular to the District. In this respect, the citizens of the District of Columbia are subject to the authority of the Congress in the same way that citizens of states are subject to the authority of their respective state legislatures.

103. Over the past two centuries, Congress has employed many different approaches to governance of the

District of Columbia. The one common thread throughout this period has been the retention by Congress of ultimate authority and control over the governmental affairs of the District.

104. In 1801, Congress adopted the Organic Act, which represented the first exercise of the power of "exclusive legislation" in the District Clause to establish a governmental structure for the District.

105. For the ensuing 70 years, mayor-council forms of government prevailed in the District, with separate government structures for the City of Washington and the City of Georgetown. A third structure existed for Alexandria City until the retrocession of the Virginia portion of the District in 1846.

106. In 1871, Congress established a territorial form of government for the District. In 1874, this form was replaced by a commission system. As modified in 1878, the governing body for the District was a three-person commission appointed by the President with the advice and consent of the Senate.

107. The Commission system was replaced by Executive Order in 1967 with a mayor-commissioner and council form of government, with both mayor-commissioner and council members appointed by the President.

108. In 1973, the form of government was again changed pursuant to legislation designated Public Law 93-198 and known as the "Home Rule Act." Under that legislation, a mayor and a council, elected by the citizens of the District, were given certain executive and legislative authority. However, the statute reserved ultimate control over District governance to the Congress, which, *inter alia*, retained the power of review and disapproval of any council-passed legislation, and the power to authorize and appropriate the total budget of the District. The District government was prohibited from legislating in a number of designated subject areas.

109. The authority of the local District government was significantly curtailed by legislation adopted in 1995 (Public Law 104-8) which, *inter alia*, established the District of Columbia Financial Responsibility and Management Assistance Authority (known as the "Control Board"), appointed by the President. The Control Board was given significant authority over the actions of the mayor and the council. District citizens have no voice in the selection of members of the Control Board.

110. By legislation adopted in 1997 (Public Law Nos. 105-33, 105-34), the authority of the Control Board over the governmental affairs of the District was significantly expanded, and the authority of the mayor and the council correspondingly curtailed.

111. In addition to the foregoing, Congress frequently exercises its authority over the District of Columbia through the imposition of conditions on the use of governmental funds as part of the annual process of authorizing the budget and appropriating funds for the operation of the government of the District of Columbia. This authority extends to and is used in connection with funds raised by the District from its own citizens.

112. The authority over the District that Congress has reserved and continues to exercise is equal to or greater than the authority that state legislatures exercise over municipalities and other inferior governmental entities within the states. However, in no state where the legislature exercises such authority over municipalities and other governmental entities are the citizens of those municipalities and entities precluded from participating in the process of selecting members of the state legislature through the exercise of the right to vote.

113. The role of Congress as the supreme legislature for the District in the District's own affairs provides a separate basis for a constitutional right of District citizens to participate in the election of members of Congress.

E. Unsuccessful Past Efforts To Secure Voting Rights for District Citizens

114. Judicial action to protect constitutional rights is especially warranted in the case of a small portion of the overall population, where that portion is unable to secure its rights through the political process because it is excluded from that process. No group of citizens is as thoroughly excluded from the national legislative process as District citizens, and the history of unsuccessful efforts to establish their right to vote for members of Congress underscores the need for judicial action to vindicate the constitutionally-protected right to vote.

115. Congress failed to provide for participation in Congressional elections by District citizens when it adopted the Organic Act in 1801.

116. In 1871, Congress authorized the District to elect a non-voting delegate to the House of Representatives. However, this authority was rescinded in 1875. Thereafter, over the next 85 years, at least 150 resolutions to amend the Constitution to provide Congressional representation for District citizens were introduced in Congress, but failed of adoption.

117. In 1960, Congress proposed the 23rd Amendment to the Constitution, providing District citizens with the right to vote in national elections, but only for President and Vice-President. That amendment was ratified by the requisite number of states and became part of the Constitution in 1961.

118. In 1970, Congress reauthorized the election of a non-voting delegate of the District of Columbia to the House of Representatives. For a brief period in the early 1990s the Delegate was authorized by the House of Representatives to participate in the Committee of the Whole (but only where the Delegate's vote would not be decisive). However, in 1995, the House revoked this privilege.

119. At no time has the District of Columbia been permitted any participation, by non-voting delegate or otherwise, in the United States Senate.

120. In 1978, Congress approved by better than two-thirds majorities in both Houses a constitutional amendment that would have treated the District as a state for purposes of representation in the Congress. This amendment would have authorized the election by District citizens of two Senators and one or more members of the House of Representatives. But the amendment failed to be ratified by the requisite number of states.

121. In 1993, the House of Representatives considered a bill to admit the District of Columbia to the union as a state, but the bill was defeated. The Senate has never voted on such a bill.

122. In July 1998, substantially all of the plaintiffs joined in a Petition to the Congress for redress of grievances. The Petition sought action by Congress to provide for participation by District citizens in the election of voting members of the Congress. To date, Congress has not acted in response to the Petition.

F. The District of Columbia's Obligation to Protect and Promote Its Citizens' Rights to Voting Representation in Congress

123. The District of Columbia, by and through its civil officers, is obligated to uphold the United States Constitution and, thereby, to protect and preserve the constitutional rights of the District's citizens. Since, the District of Columbia is the only governmental entity accountable to the electorate in the District, it is the only governmental entity with an interest in protecting the right of District citizens to vote for members of the United States Congress.

124. The District of Columbia is subject to and obliged to carry out laws of both local and national application

enacted by Congress as the ultimate legislative authority for the District. Furthermore, Congress controls the annual budget and appropriations for the District of Columbia, which in turn control the actions the District of Columbia can take to carry out its obligations, functions, and duties as a municipal corporation. In every other jurisdiction in the nation, the ultimate legislative authority to which a municipal corporation is subject is directly accountable to the voting citizens of that subordinate municipality. The District of Columbia has an interest in achieving similar representation for its citizens in Congress.

G. Defendants' Role In the Deprivation Of The Right of District Citizens To Vote For Members of Congress

125. Pursuant to statute, the Secretary of Commerce, through officials of the Bureau of the Census under his control and supervision, conducts a census of population every ten years as of the first day of April of the census year.

126. For purposes of conducting the Census, the District of Columbia is treated as a state, and its citizens are counted during each decennial census.

127. The Bureau of the Census counts the number of persons in each state, including the District of Columbia. For this purpose, persons residing on federal enclaves located within the borders of a state are counted as if they are residents of the state in which the enclave is located.

128. By statute (13 U.S.C. § 141), the Secretary of Commerce is required to report to the President, for purposes of apportionment of the Representatives in Congress, the total population by states within nine months of completing the census.

129. When making this report, the Secretary treats residents of federal enclaves located within a state as residents of the state in which the enclave is located. It is the practice of the Secretary not to include the residents of the District within

the total population of any state, nor to report the population of the District separately as part of the report.

130. The most recent report from the Secretary of Commerce to the President for apportionment purposes, submitted to the President in 1990, did not include an entry for the District of Columbia and did not include the population of the District of Columbia within the totals reported for any state.

131. The Secretary of Commerce would not in the future include, within any report to the President of state populations for apportionment purposes, a separate entry for the District of Columbia, nor would he include the District of Columbia population as part of the population of any state.

132. Upon receipt of the report of state populations for apportionment purposes from the Secretary of Commerce, the President is required to submit to Congress a statement showing the whole number of persons in each State and the number of representatives to which each state would be entitled under an apportionment of the then-existing number of representatives. The President's 1990 submission was based on the report received from the Secretary of Commerce. It did not include an entry for the District of Columbia nor did it include the District's population within the population of any state.

133. By statute (2 U.S.C. § 2a), it is the duty of the Clerk of the House of Representatives to send to the chief executive of each state a certificate of the number of representatives to which such state is entitled in the House of Representatives.

134. Upon receipt of the submission on apportionment from the President, defendant Carle, as Clerk of the House of Representatives, would not send to the District of Columbia a certificate entitling it to one or more voting members of the House of Representatives, and her predecessor did not do so following receipt of the last such submission from the President. The certificates that she would send to

each of the states would not reflect the population of the District of Columbia in the number of representatives apportioned to each state, just as they did not do so after the last Congressional reapportionment.

135. Defendant Carle, as Clerk of the House of Representatives, would not give effect to votes cast by the citizens of the District in determining the prevailing candidate entitled to be included on the Roll of the House or to have his or her floor vote counted for purposes of certifying the passage of a Bill or Resolution.

136. Defendant Livingood, as Sergeant at Arms of the House of Representatives, would not give effect to votes cast by citizens of the District in determining the prevailing candidate entitled to enter the floor of the House.

137. Defendant Eagan, as Chief Administrative Officer of the House, would not give effect to votes cast by citizens of the District in determining the prevailing candidate entitled to be paid a Representative's salary.

138. Defendant Sisco, as Secretary of the United States Senate, would not give effect to votes cast by citizens of the District in determining the prevailing candidate entitled to receive a Senator's salary or to have his or her credentials as a Senator recorded. Nor would defendant Sisco send a model form to an official of the District of Columbia for certification of the results of a Senatorial election, as he does to the secretary of state or the governor of the fifty states where there is an upcoming election.

139. Defendant Casey, as Sergeant at Arms for the United States Senate, would not give effect to votes cast by citizens of the District in determining the prevailing candidate entitled to enter the floor of the Senate as a Senator.

140. These actions and omissions of the Defendants have caused the individual Plaintiffs to be actually injured, by depriving them in the past of the Constitutional right to participate in elections for voting members of Congress.

Furthermore, these actions and omissions of the Defendants cause the individual Plaintiffs to be threatened with imminent harm, by precluding them from participating in elections for voting members of Congress in the future.

141. These actions and omissions of the defendants also injure the District of Columbia by preventing the District from upholding the Constitutional right of District citizens to participate in elections for voting members of Congress. The absence of voting representation in Congress for District citizens injures, in turn, the District of Columbia's interests as a municipal corporation.

142. There is a substantial likelihood that these actual and threatened injuries will be redressed by the declaratory and injunctive relief that Plaintiffs seek in this action.

CAUSES OF ACTION

With the preceding principles, facts and history as a foundation, plaintiffs allege the following causes of action:

COUNT ONE
(Denial of Equal Protection)

143. The constitutional principle of "One Person, One Vote" applies to and is for the benefit of citizens of the District of Columbia to the same extent as it is for all other citizens of the United States. The denial to District citizens of the opportunity to vote for members of the United States Congress constitutes a violation of the "One Person, One Vote" principle embodied within the doctrine of Equal Protection of the Laws as set forth in the Fourteenth Amendment to the Constitution, and as incorporated in the Fifth Amendment to the Constitution, and as such is a violation of the constitutional rights of District citizens.

144. The denial to District of Columbia citizens of the right to vote for members of the United States Congress, solely by reason of their residency in the District of Columbia,

results in District citizens being treated unequally in relation to United States citizens residing in the fifty states, to citizens living on federal enclaves throughout the United States, and to citizens living abroad. This unequal treatment deprives District citizens of Equal Protection of the Laws, as set forth in the Fourteenth Amendment to the Constitution and as incorporated within the Fifth Amendment to the Constitution.

145. Defendants by their official conduct are violating the constitutional rights of District citizens to Equal Protection of the Laws.

146. Defendants by their official conduct are also preventing the District of Columbia from upholding the Constitutional rights of District citizens, and are causing injury to the interests of the District of Columbia as a governmental entity.

COUNT TWO
(Denial of Due Process)

147. The right of citizens of the United States proper to vote for members of the United States Congress is a fundamental attribute of United States citizenship deeply rooted in the nation's heritage and implicit in the concept of ordered liberty. As such, it is a liberty interest protected by the Due Process clause of the Fifth Amendment to the Constitution.

148. In addition, the right to due process guaranteed to all citizens entitles them to participate in the selection of members of the national legislature, which body is empowered to enact laws that can deprive or result in the deprivation of the lives, liberty or property of those citizens. The process of participating in the selection of members of the governing legislature is an analogue to the right to a fair trial before being subject to judicial authority and to the right to notice and hearing before being subject to administrative action.

149. The denial of the right to vote for members of the United States Congress constitutes a deprivation of the

liberty of citizens of the District of Columbia without Due Process of Law, and subjects them to deprivation of their lives, liberty or property without Due Process of Law, in violation of the Fifth Amendment to the Constitution.

150. Defendants by their official conduct are depriving citizens of the District of Columbia of life, liberty and property without Due Process of Law.

151. Defendants by their official conduct are also preventing the District of Columbia from upholding the Constitutional rights of District citizens, and are causing injury to the interests of the District of Columbia as a governmental entity.

COUNT THREE
(Denial of Privileges of Citizenship)

152. The right to vote for members of the United States Congress is a privilege of national citizenship possessed by all citizens of the United States proper. Privileges of national citizenship that attach to United States citizens derive from the adoption of the Constitution. These privileges of citizenship are protected against state abridgment by the Fourteenth Amendment, and, by incorporation into the Fifth Amendment of the Constitution, against abridgment by federal officials. They are also protected by the Ninth Amendment to the Constitution.

153. The denial of the right of District citizens to vote for members of the United States Congress is an abridgment of a privilege of national citizenship protected by the Fifth, Ninth, and Fourteenth Amendments to the Constitution.

154. Defendants by their official conduct are abridging the privileges of national citizenship possessed by District of Columbia citizens.

155. Defendants by their official conduct are also preventing the District of Columbia from upholding the Constitutional rights of District citizens, and are causing injury

to the interests of the District of Columbia as a governmental entity.

COUNT FOUR
(Violation of Article I, Section Two, and the Seventeenth Amendment of the Constitution)

156. Article I, Section Two, of the Constitution provides that the members of the House of Representatives shall be selected by "the People of the Several States." The Seventeenth Amendment to the Constitution provides that the Senate shall be composed of two Senators from each State "elected by the people thereof."

157. Citizens of the area that became the District of Columbia were citizens of the original states of Maryland and Virginia, and were thus among "the People of the Several States," at the time the Constitution was adopted. Citizens of the District of Columbia are among the "Posterity" for whom the Constitution, as recognized in its Preamble, ordained and established the "Blessings of Liberty," including the fundamental right to vote for members of the United States Congress. Citizens of the District of Columbia are treated as state citizens for many purposes in federal legislation, and have been so treated in judicial decisions interpreting the Constitution.

158. If the provisions of Article I, Section 2, and of the Seventeenth Amendment were construed to exclude District of Columbia citizens from participation in the election of members of the United States Congress, they would be in conflict with other provisions of the Constitution, including the Fifth, Ninth, and Fourteenth Amendments, which, as their meaning and scope have been developed over the past century, now embody a guarantee of voting participation in the electoral process for all citizens of the United States proper, including citizens of the District of Columbia.

159. The provisions of Article I, Section 2, and the Seventeenth Amendment, properly construed to be in harmony

with the balance of the Constitution, include District citizens among the people of the states entitled to participate in the election of members of the House of Representatives and the Senate.

160. The denial to District citizens of the right to vote for members of the United States Congress deprives them, as among the people of the several states, of their right to vote in violation of Article I, Section Two, and the Seventeenth Amendment of the Constitution.

161. Defendants by their official conduct are violating the right to vote of District citizens protected by Article I, Section Two, and the Seventeenth Amendment of the Constitution.

162. Defendants by their official conduct are also preventing the District of Columbia from upholding the Constitutional rights of District citizens, and are causing injury to the interests of the District of Columbia as a governmental entity.

COUNT FIVE
(Denial of a Republican Form of Government)

163. The United States Constitution establishes a republican form of government for the federal government. Article IV, Section 4, of the Constitution guarantees to each state a republican form of government. Taken together, these aspects of the Constitution are intended to assure the citizens of the United States that they are entitled to republican forms of government at both the federal and state levels.

164. An essential element of a republican form of government is that those governed have the right, through exercise of the franchise, to participate in the election of the members of the legislative body whose laws will govern them.

165. Citizens of the District of Columbia are governed by the United States Congress, which possesses and exercises the supreme legislative authority over the District and its citizens. By being denied the right to participate in the

election of members of the Congress, District citizens are deprived of the right and benefits of a republican form of government, as guaranteed and established by the United States Constitution.

166. Defendants, by their official conduct, are denying District citizens' right to be governed under a republican form of government.

167. Defendants by their official conduct are also preventing the District of Columbia from upholding the Constitutional rights of District citizens, and are causing injury to the interests of the District of Columbia as a governmental entity.

PRAYER FOR RELIEF

Based on the foregoing, Plaintiffs request that the Court grant the following relief:

1. Issue a DECLARATORY JUDGMENT declaring that individual plaintiffs, in common with all adult citizens of the District of Columbia, possess a constitutional right to vote in elections for members of the United States House of Representatives and the United States Senate; that they have been deprived of this right without warrant or justification; that defendants have violated this right; that the continuing deprivation of this right violates one of the most precious attributes of United States citizenship; that 2 U.S.C. § 2a and 13 U.S.C. § 141 are unconstitutional insofar as they require or have been applied to effect the exclusion of citizens of the District of Columbia from the Congressional apportionment process; and that any other statutes or rules of the House or Senate (*e.g.*, 2 U.S.C. §§ 25, 25a, & 26, 2 U.S.C. § 60c-1, 2 U.S.C. § 78, 2 U.S.C. § 80, House Rules III, IV, XXXII, and Rule II of the Standing Rules of the Senate) are unconstitutional to the extent that they require or have been applied to effect the denial of the right to vote in Congressional elections to citizens of the District of Columbia.

2. Issue a DECLARATORY JUDGMENT declaring that the deprivation of the right of citizens of the District to participate in the election of members of the United States Congress prevents the District of Columbia from carrying out its responsibilities to its citizens, and is causing injury to the interests of the District of Columbia as a governmental entity.

3. Defer further relief for a reasonable period of time to provide Congress an opportunity, on the basis of the Court's declaratory judgment, to fashion a constitutional remedy that will vindicate the constitutional rights of citizens of the District of Columbia to vote for members of the United States Congress.

4. Failing appropriate action by the Congress, order INJUNCTIVE RELIEF as necessary to assure vindication of the constitutional rights of District citizens to vote for members of the United States Congress. Such relief could include:

a. ENJOINING defendant Daley, and his successors in office, to account for the citizens of the District of Columbia in reporting to the President methods of future apportionments of the seats in the House of Representatives;

b. ENJOINING defendant Carle, and her successors in office, to account for citizens of the District of Columbia in transmitting the certificates apportioning the voting members of the House of Representatives;

c. ENJOINING defendants Carle, Livingood, and Eagan, and their successors in office, to give effect to votes cast by District citizens in determining the prevailing candidates entitled to be entered upon the Roll of the House, to be admitted to the House Floor, to receive the salary of a Representative, and/or to cast floor votes to be counted for purposes of certifying the passage of Bills and Resolutions;

d. ENJOINING defendant Sisco, and his successors in office, from transmitting to the states letters certifying upcoming elections for United States Senators, unless provision is made for participation by citizens of the District of Columbia in the election of members of the United States Senate;

e. ENJOINING defendants Sisco and Casey, and their successors in office, to give effect to the votes of citizens of the District of Columbia in appropriate senatorial elections in determining the prevailing candidate entitled to have his or her election as a Senator officially recorded, to be admitted to the Senate floor, and/or to receive the salary of a Senator;

f. ORDERING the parties to present plans setting forth their recommended best means for assuring the right of District of Columbia citizens to participate in the election of voting members of Congress;

g. After full consideration of the parties' proposed plans, ORDERING the steps that will most appropriately assure the right of District of Columbia citizens to participate in the election of voting members of Congress.

5. AWARD plaintiffs their reasonable attorney fees and allowable costs of court; and

6. ORDER such further or different relief that the Court deems just and proper.

Respectfully submitted,

s/

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No. 99-2062

IN THE

Supreme Court of the United States

CLIFFORD ALEXANDER, *et al.*,

Appellants,

v.

WILLIAM M. DALEY,
Secretary of Commerce, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the continued denial to District of Columbia residents of the right to voting representation in the House of Representatives violates the equal protection guarantee of the Fifth Amendment's due process clause and the guarantee secured by Section 1 of the Fourteenth Amendment of the fundamental rights of national citizenship.

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INTEREST OF THE *AMICUS CURIAE*

The American Bar Association, with more than 400,000 members, is the leading national membership organization of the legal profession. Its members come from each of the fifty states and the District of Columbia. Membership is voluntary, and includes attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as legislators, law professors, law students, and non-lawyer associates in related fields.[1]

The ABA House of Delegates, at its August 1999 Annual Meeting, adopted the following Resolution:

> RESOLVED, that the American Bar Association supports the principle that citizens of the District of Columbia shall no longer be denied the fundamental right belonging to other American citizens to vote for voting members of the Congress which governs them.

---

1. This brief is filed with the consent of both appellants and appellees. Pursuant to the Court's Rule 37.6, *amicus curiae* ABA states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The amicus brief is submitted in accordance with this policy of the Association, and to assist in securing implementation of the principle which it supports.

The ABA has consistently worked for the extension of the right of suffrage, both in this country and abroad. One of the ABA's basic goals is to promote the rule of law — a basic principle of which is denied when those governed by the laws of Congress are precluded from voting for those who enact them. The ABA has adopted resolutions supporting increased voter participation in national elections, and fair Congressional redistricting. The ABA has also endorsed the International Covenant on Civil and Political Rights, which provides in Article 25 that: "*Every citizen* shall have the right . . . to vote . . . at genuine periodic elections which shall be *by universal and equal suffrage*. . . ." (Emphasis supplied.) The ABA is concerned with the denial of that right wherever it occurs, and most particularly close to home, in our nation's capital.[2]

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2. Amicus notes that the general public also appears to support the principle of voting representation in Congress for the District of Columbia. A recent survey reported that, among a representative sample of U.S. adults polled, 72 percent supported voting rights in Congress for citizens of the District of Columbia. "7 of 10 Back D.C. Voting Rights," Washington Post, April 13, 2000, at B3; "Vote of Confidence," Washington Times, April 14, 2000, at C4.

ARGUMENT

DENYING D.C. CITIZENS THE RIGHT TO VOTING REPRESENTATION IN CONGRESS RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS

The ABA Resolution, quoted *supra*, attacks the denial of voting representation in Congress on two basic grounds: (1) denial to D.C. citizens of suffrage rights equal to those of other American citizens; and (2) denial to D.C. citizens of a fundamental right of American citizens. These two policy grounds correspond to two constitutional challenges to the denial of D.C. citizens' rights to voting representation in Congress: (1) the denial violates the equal protection guarantee provided by the Fifth Amendment due process clause; and (2) the denial violates a fundamental right and privilege of U.S. citizenship secured by Section 1 of the Fourteenth Amendment.

Both of these constitutional challenges to the current denial of the franchise, *amicus* submits, warrant plenary review. If upon such review this Court sustains either or both of these challenges, the Court might deem it unnecessary to resolve the difficult Article I issues that so sharply divided the court below in interpreting the Framers' original design. Alternatively, in order to avoid the need to resolve the constitutional challenges to the apportionment statute under the Fifth and Fourteenth Amendments, the ambiguities in Article I might be resolved so as to uphold the interpretation of Article I given by the dissenting judge below, and the position of appellants here.

A. Due Process/Equal Protection Guarantees Under The Fifth Amendment

The Fifth Amendment, containing the due process clause, was ratified with the rest of the Bill of Rights in 1791. In 1954 this due process clause was held to include a guarantee, as against the federal government, of equal protection of the laws. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (decided together with *Brown v. Board of Education*). Accordingly, the Congressional statutes segregating the D.C. public schools were held in *Bolling* to violate the Fifth Amendment's due process guarantee.

Subsequent Supreme Court cases have made it clear that this Fifth Amendment guarantee of equal protection is fully equivalent in its scope to the Fourteenth Amendment's guarantee of equal protection of the laws. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment"); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (collecting cases).

1. D.C. Residents Are Denied Protection Equal to That of Residents of the 50 States

The long line of Supreme Court cases that have applied the Fourteenth Amendment's equal protection guarantee in striking down state apportionment statutes which violated the principle of "one person, one vote" should also be applicable, under *Bolling* and its progeny, in determining

whether federal legislation violates the right of D.C. citizens to an equal voice with citizens of the 50 states in elections for the Congress which governs them all. But as to D.C. citizens in Congressional elections, the present rule is "one person, no vote." This disparity and disenfranchisement cannot withstand the scrutiny required by the Fifth Amendment guarantee of equal protection, any more than a denial to residents of one particular locality of the right to vote in statewide elections could withstand the scrutiny mandated by the equal protection guarantee of the Fourteenth Amendment. "[T]he weight of a citizen's vote cannot be made to depend on where he lives." *Reynolds v. Sims*, 377 U.S. 533, 567-68 (1964). "Undoubtedly, the right to suffrage is a fundamental matter in a free and democratic society. . . . [A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 561-62.

Accordingly, Judge Oberdorfer's dissenting opinion below applies a "strict scrutiny" test and concludes that the denial of suffrage to D.C. residents in elections for Representatives violates the equal protection guarantee of the Fifth Amendment due process clause, since no compelling governmental interest is involved. (See 131-33a.)[3] The opinion also notes that this denial of suffrage cannot pass muster even under the alternative, less stringent tests of scrutiny used in evaluating other equal protection challenges, involving denials of rights less fundamental than voting. (132a.)

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3. For the convenience of the Court and the parties, page citations by *amicus* to the opinions below will be to the pages of Appellants' Appendix.

The majority opinion below acknowledges that the denial of suffrage in issue here would not pass the strict scrutiny test of the Fifth Amendment's equal protection guarantee. "We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress. As the dissent argues, denial of the franchise is not necessary for the effective functioning of the seat of government." (59a; footnote omitted.) But, the majority goes on to hold, "strict scrutiny does not apply in this case," and equal protection analysis is not pertinent, because "the voting qualification of which plaintiffs complain is one drawn by the Constitution itself" in Article I, Section 2. In the majority's view, "the right to equal protection cannot overcome the line explicitly drawn by that Article." (59-60a.)

The basic flaw in the majority's approach, which regards the language of Article I, Section 2 as controlling, is that the Fifth Amendment due process guarantee was adopted *subsequent* to Article I. The original Constitution was ratified in 1788; the Bill of Rights was ratified in 1791. If Article I provisions conflict with the Fifth Amendment guarantee, then the later enacted constitutional language should control. To be sure, 163 years passed before the Supreme Court construed the Fifth Amendment due process clause to include a guarantee of equal protection. But that is no reason to withhold application of equal protection guarantees now. As this Court pointed out in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), in striking down the Virginia poll tax on equal protection grounds and overruling prior precedent in order to do so: "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." (*Id.* at 669; emphasis in original.) Here, as in *Harper*, the Court should apply the equal protection

guarantee according to current notions of equal protection for the right of suffrage. Perhaps the most recent statement of this notion is in Justice Breyer's concurring opinion, joined by Justice Ginsburg, in *Nixon v. Shrink Missouri Government PAC*, No. 98-963, 68 U.S.L.W. 4102, 4108 (U.S. Jan. 24, 2000). Justice Breyer there characterizes *Reynolds v. Sims, supra*, as meaning that: "in the context of apportionment, the Constitution 'demands' that each citizen have 'an equally effective voice.' "

In order to give "each citizen" of D.C. "an equally effective voice," in the context of Congressional apportionment, 13 U.S.C. § 141(b) as construed by the defendant Secretary of Commerce must be held invalid, and D.C. residents counted in the apportionment process. Applying current Fifth Amendment concepts of equal protection to the Organic Act of 1801 which terminated District residents' voting for Congress (see 87-89a), that Act should be deemed invalid insofar as it repealed the provisions of prior law which had enabled District residents to vote for representatives in Congress in the federal elections conducted by Maryland and Virginia. By repealing those provisions — and not replacing them with any alternative means for District residents to vote for Congress — the Act deprived District residents of a Fifth Amendment due process right to a voice in Congress which was "equally effective" with that of residents of Maryland, Virginia, and the other states.[4]

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4. Under this analysis, the deprivation worked by the Organic Act of 1801 was not of merely personal rights which died with the generation of individuals who had possessed them in 1800, as the majority opinion holds (see 49-50a). Rather, the 1801 statute effected a deprivation of constitutional due process rights to an equal voice in Congress; such due process rights would inure to D.C. residents of every generation, and thus be enforceable by D.C. residents today.

2. D.C. Residents Are Denied Protection Equal to That of Enclave Residents

Under this Court's decision in *Evans v. Cornman*, 398 U.S. 419 (1970), residents of a State-ceded federal enclave retain the right to an equal voice with the ceding state's citizens in electing Representatives to Congress. The equal protection clause of the Fourteenth Amendment secures to residents of federal enclaves this "constitutionally protected right to cast an equally weighted vote" (to use the language of *Lucas v. Colorado*, 377 U.S. 713, 736 (1964)). This is so, *Evans* holds, notwithstanding the fact that, under the terms of Article I, Section 8, Clause 17, a ceded enclave is subject to the very same grant of Congressional power "To exercise exclusive Legislation" as is the District ceded for the seat of government.

Amicus submits that this disparate access to the Congressional franchise for enclave and D.C. residents denies to the latter equal protection of the law. The apportionment statute, 13 U.S.C. § 141(b), when applied to count enclave but not D.C. residents in apportioning House seats, violates the Fifth Amendment's due process/equal protection guarantee of D.C. residents' "right to cast an equally weighted vote" for Congress.

The majority opinion below, although acknowledging that such an *Evans*-based argument has "some appeal" (54a), seeks to avoid this consequence of *Evans* by concluding (56-57a) that a district court is bound to reject it under the authority of this Court's summary affirmance in *Albaugh v. Tawes*, 379 U.S. 27 (1964). To be sure, the majority below recognizes "there may be tension between *Evans* and *Albaugh*" (56a) and appears to invite Supreme Court

resolution of this tension. ("We must apply the law as it now stands and, until the Supreme Court instructs otherwise, that law is set forth in *Albaugh*", 57a.) Need for resolution by the Supreme Court of this apparent conflict between the rationales of its decisions in *Evans* and in *Albaugh* — as *Albaugh* is read by the majority below — would in itself afford a sufficient reason for noting probable jurisdiction herein.

Amicus respectfully submits, however, that the majority below errs when it relies on the summary affirmance in *Albaugh* as controlling authority to reject the appellants' Fifth Amendment due process/equal protection challenge to disparate treatment of D.C. and enclave residents' rights to voting representation in the House. The Supreme Court's affirmance, without opinion, of the judgment of the three-judge district court in *Albaugh* does not foreclose, or even speak to, the Fifth Amendment equal protection argument raised in the instant suit. The two-page district court opinion in *Albaugh* contains no discussion or indication of any challenge by Mr. Albaugh under the Fifth Amendment due process clause. Nor does the analysis of Albaugh's Jurisdictional Statement presented by the majority below (see 41a) suggest that the appellant Albaugh sought to raise such a Fifth Amendment challenge in this Court. Accordingly, this Court's summary affirmance of the *Albaugh* district court's judgment should not be read to conflict with or detract from the force of *Evans'* equal protection analysis. *Evans* supports the equal protection claim here, while *Albaugh* simply does not address that constitutional issue.[5]

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5. It is doubtful that plaintiff Albaugh would even have possessed standing to challenge an alleged denial of Fifth Amendment equal protection to D.C. residents. Mr. Albaugh was

(Cont'd)

3. D.C. Residents Are Denied Protection Equal to That of U.S. Residents Domiciled Overseas

Congress has provided that residents of any of the 50 states who move their domicile overseas may continue to vote (or vote for the first time) in Congressional elections held in the state wherein they were last domiciled. No present or continuing connection with such state is required. The voting is by absentee ballot. See Overseas Citizens Voting Rights Act, 42 U.S.C. § 1973ff-1 *et seq.*

Thus, for example, a New York attorney who moves his or her practice and domicile to Brussels or London retains the right to vote for representation in the U.S. Congress, by

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(Cont'd)
not a D.C. resident, nor did he purport to bring his suit on behalf of D.C. residents. Rather, as the caption in the district court indicated, Albaugh expressly filed his suit in the capacity of a Maryland primary election candidate. *William A. Albaugh, Republican Candidate in the Contested 1964 Maryland Primary Election for United States Senator Nomination v. J. Millard Tawes, Governor of Maryland, et al.*, 233 F. Supp. 576 (D. Md. 1964). Albaugh sought, as a defeated candidate, to have the Republican Senatorial Primary Election declared null and void on the ground that D.C. residents did not vote in that primary election. His complaint asked the court to declare "that the District of Columbia is a part of the State of Maryland for purposes of United States Senator elections. . . ." *Id.* at 576. The district court dismissed the complaint, holding that the passage by Congress of the "Organic Act of 1801" had terminated the Maryland citizenship of residents of the area ceded to form the District of Columbia, leaving them "no right to vote in Maryland elections generally, and specifically, in the selection of United States Senators." *Id.* at 577. The opinion did not go on to consider whether the 1801 statute might have violated D.C. residents' constitutional right to equal protection under the Fifth Amendment.

casting an absentee ballot mailed to New York. But if that same attorney relocates the attorney's domicile from New York to Washington, D.C., then he or she loses the right to vote for a voting Representative in Congress. Congress' action (through 13 U.S.C. § 141(b)) in denying D.C. residents the right to voting representation in the Congress which enacts the federal and local laws that govern the lives of the citizens of the nation's capital, while Congress confers the Congressional franchise upon residents who have chosen to live abroad and largely under foreign legislation, appears paradoxical. This disparate treatment of voting rights cannot withstand the "strict scrutiny" required by the due process/ equal protection clause. (See the dissent below at 138-42a.) No compelling interest of the federal government requires this denial of equal voting rights to D.C. residents; both the majority (see 59a) and the dissent (see 141-42a) agree that the defendants herein have offered no compelling justification for such a denial of voting Congressional representation for D.C. residents. Accordingly, *amicus* submits, this ground of plaintiff's equal protection challenge should be sustained, or at least entertained as a substantial constitutional issue warranting plenary review.

The majority, however, suggests in a footnote that the plaintiffs may not be able to question the disparity of treatment between those who move from a state to D.C. and those who move overseas, because the suit is "brought on behalf of all District residents regardless of whether they have ever lived in a state. . . ." (62a, n.62.) The majority's suggestion in this regard should be rejected. The complaint identifies various plaintiffs who moved to the District of Columbia from States where they had the right to vote for representation in Congress. (See Complaint, 176a *et seq.*)

B. Privileges of National Citizenship Under the Fourteenth Amendment

The Citizenship Clause of the Fourteenth Amendment confers, as a privilege of national citizenship, the right to vote for national officers. That proposition is common ground for the two-judge majority and the plaintiffs. It is based upon language in *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), and language in the concurring opinion of Justice Kennedy in *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838-45 (1995). Thus the majority opinion below states:

> We do not disagree that the "right to vote for national officers' is a 'right[ ] and privilege[ ] of national citizenship.' " *Twining v. New Jersey*, 211 U.S. 78, 97 (1908). . . . Nor do we dispute Justice Kennedy's statements, in a concurrence repeatedly cited by plaintiffs, that . . . "[T]he federal right to vote . . . belong[s] to the voter in his or her capacity as a citizen of the United States."

(63a, footnote and parentheses omitted; the quotation from Justice Kennedy's opinion is cited to *U.S. Term Limits* at 844.)

In a recent decision, which breathed new life into the Fourteenth Amendment's privileges and immunities clause, the Supreme Court held that "the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the states." *Saenz v. Roe*, 526 U.S. 489, 507-08 (1999). The Court accordingly struck down federal legislation, as well as state law provisions, that were held to violate the

right of national citizens to travel to and settle in another state, because these federal and state statutory provisions had authorized California, in violation of the Fourteenth Amendment's guarantees, to make smaller welfare payments to residents newly arrived from other states than to longer-term California residents.

It should follow that the Citizenship Clause of the Fourteenth Amendment would likewise prohibit the national government from legislating to deny residents of the District of Columbia the same "right to vote for national officers [which] is a right and privilege of national citizenship" enjoyed by all other citizens who are domiciled on the U.S. mainland (or who have moved their domicile abroad).[6]

The court below relied heavily on the case of *Loughborough v. Blake*, 18 U.S. 643, 647 (1820), for the view that D.C. residents had "voluntarily relinquished their right of representation" in Congress. That statement, which was dictum, does not merit nearly as much precedential

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6. During the Senate's consideration of a proposed constitutional amendment in support of District of Columbia voting representation, Senator Robert S. Dole of Kansas said:

> The absence of voting representation for the District in Congress is . . . an unjustifiable gap in our scheme of representative government. . . . It seems clear that the framers of the Constitution did not intend to disenfranchise a significant number of Americans by establishing a Federal District. I believe that the framers would have found the current situation offensive to their notions of fairness and participatory government.

(124 Cong. Rec. 27254-55).

weight as the majority accorded it. (See 37a, 71a). The case involved a challenge to the validity of a direct tax imposed on D.C. residents which was apportioned on the basis of the census. The dictum was not needed to decide the issue in the case; the case did not involve a challenge to the constitutionality of D.C. residents' disenfranchisement on Fifth or Fourteenth Amendment grounds. Even Chief Justice Marshall acknowledged in *Loughborough* that "in theory it might be more congenial to the spirit of our institutions to admit [to Congress] a representative of the District. . . ." *Loughborough, supra*, at 647. Moreover, the case was decided nearly half a century before the ratification of the Fourteenth Amendment, which recognized the rights of national citizenship, including the right to vote for Congress.

Because the federal apportionment statute as applied violates D.C. residents' rights of national citizenship to vote in elections for national legislative officers, the statute as so applied should be held invalid under the Fourteenth Amendment. At the least, its validity *vel non* presents a substantial question, which this Court should note probable jurisdiction to resolve in this case.[7]

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7. If this Court rules that District residents have a constitutional right to voting representation in the House, the form of remedy to vindicate that right would, in the first instance, be a matter to be decided by the Congress. For instance, Congress might create a separate District seat, or provide for D.C. residents to vote in Congressional elections in Maryland. But just as "one person one vote" redistricting of the House did not come about until this Court required it, a declaration by this Court that D.C. residents have a constitutional right to such representation appears to be a critical prerequisite for attaining apportionment of representation to them.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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CLIFFORD ALEXANDER, ET AL., APPELLANTS

v.

NORMAN Y. MINETA, SECRETARY OF COMMERCE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether residents of the District of Columbia have a constitutional right to vote for Members of the House of Representatives.

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In the Supreme Court of the United States

No. 99-2062

CLIFFORD ALEXANDER, ET AL., APPELLANTS

v.

NORMAN Y. MINETA, SECRETARY OF COMMERCE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States and the Secretary of Commerce, respectfully moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-72a, 75a-145a) is reported at 90 F. Supp. 2d 35.

JURISDICTION

The judgment of the district court (J.S. App. 73a-74a) was entered on March 20, 2000. The notice of appeal (J.S. App. 171a-174a) was filed on May 19, 2000. The jurisdictional statement was filed on June 23, 2000. The

jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. Article I, Section 2 of the United States Constitution, which governs the election and apportionment among the States of Representatives, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. Art. I, § 2, Cl. 1. Section 2 further provides that Representatives "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." *Id.* Art. I, § 2, Cl. 3; see also *id.* Amend. XIV, § 2. The Constitution identified the 13 original States by name and apportioned Representatives among them pending the first of the "actual Enumeration[s]" of the "respective Numbers" of the States to be made at least every ten years "in such Manner as [Congress] shall by Law direct." *Ibid.*

Congress has provided by statute that the Secretary of Commerce shall take the decennial census and report to the President "[t]he tabulation of total population by States * * * as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141 (a) and (b). The President must, within one week of the convening of the new Congress following the decennial census, transmit to Congress "a statement showing the whole number of persons in each State * * * and the number of Representatives to which each State would be entitled under an apportionment of the then-existing number of Representa-

tives by the method known as the method of equal proportions." 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442 (1992) (sustaining constitutionality of equal proportions method). Each State is entitled to the number of Representatives set forth in the President's statement, and the Clerk of the House of Representatives must, within 15 days of receiving the President's statement, send the executive of each State a certificate indicating that number. 2 U.S.C. 2a(b) (1994 & Supp. IV 1998).

Article I, Section 8 of the Constitution provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. Const. Art. I, § 8, Cl. 17. Since the District of Columbia became the Seat of Government of the United States nearly two hundred years ago, District residents have not been considered residents of any State for purposes of the decennial census and representation in Congress. Accordingly, the District has never been apportioned any Representatives in the House of Representatives, and provision has not been made for the citizens of the District to vote in congressional elections. See J.S. App. 44a, 89a.

2. a. On September 14, 1998, appellants—the District of Columbia and a group of District residents—commenced this suit against the Secretary of Commerce, various officers of the Senate and the House of Representatives, and the United States in the United States District Court for the District of Columbia. J.S. App. 3a-4a. Appellants contended that they have the right to voting representation in the House of Representatives and the Senate by virtue of Article I,

Sections 2 and 3 of the Constitution. *Ibid.* They further contended that the denial of congressional representation violates their rights to equal protection of the laws and due process, abridges their privileges and immunities as citizens of the United States, and denies them their right to a republican form of government as guaranteed by Article IV, Section 4 of the Constitution. *Ibid.* See also *id.* at 214a-219a.

Appellants sought a declaration that adult citizens of the District of Columbia have the right to vote for Senators and Representatives in the House of Representatives and that 2 U.S.C. 2a, 13 U.S.C. 141, and any other statutes or legislative rules denying them that right are unconstitutional. See J.S. App. 219a. Appellants also sought injunctions ordering the Secretary of Commerce and the defendant House and Senate officers to account for the citizens of the District of Columbia in performing their various responsibilities in connection with apportioning seats in the House of Representatives and in determining the identity of Representatives and Senators. See *id.* at 220a-221a.

The district court determined that the case should be heard by a three-judge district court under 28 U.S.C. 2284(a), which requires the convening of such a court in a case challenging the constitutionality of the apportionment of congressional districts. J.S. App. 170a; see *Montana*, 503 U.S. at 446.[1] The parties filed motions to dismiss and for summary judgment. Acting on those motions, the three-judge court entered judgment in favor of the defendants with respect to those claims

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[1] The district court also consolidated this case with *Adams* v. *Clinton*, part of which is currently pending in this Court (No. 00-97). We are filing a separate motion to dismiss or affirm in that case.

challenging the constitutionality of the apportionment of members of the House of Representatives. J.S. App. 73a-74a. The three-judge court remanded to the single-judge court appellants' other claims. See *id.* at 4a-6a.[2]

b. The three-judge court held that appellants present a justiciable case or controversy and have standing to pursue their claims. See J.S. App. 7a-17a. The court, however, rejected each of appellants' claims on the merits. See *id.* at 17a-72a.

The court first considered appellants' contention that the District should be treated as a "State" for purposes of Article I, Section 2. See J.S. App. 17a-39a. The court concluded that the text of the constitutional provisions governing the composition of the House of Representatives and the Senate establishes that the District is not properly treated as a "State" for purposes of Article I, Section 2. *Id.* at 21a-27a. The court further concluded that historical evidence (*id.* at 27a-34a) and a uniform body of judicial precedent (*id.* at 34a-38a) confirm that District residents have no right to vote in congressional elections.

The district court next considered appellants' contention that District residents must be allowed to vote for Representatives as "residual" citizens of Maryland. See J.S. App. 40a-58a. The court noted that it was bound by this Court's decision in *Albaugh* v. *Tawes*, 379 U.S. 27 (1964) (per curiam), which summarily affirmed a ruling that the District of Columbia is not a part of Maryland for the purpose of electing United States Senators. J.S.

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[2] The single-judge court entered judgment against appellants on the remanded claims, see J.S. App. 159a-160a, and appellants have appealed to the United States Court of Appeals for the District of Columbia Circuit. No. 00-5238 (D.C. Cir.) (held in abeyance pending disposition of this appeal).

App. 40a-42a, 56a-57a. The court also stated, however, that it would reject appellants' argument even if *Albaugh* were not an impediment because the Maryland citizenship of the District's inhabitants was extinguished upon completion of the transfer of the seat of the national government to the District. *Id.* at 42a. The court explained that residents of the area that later became the District remained citizens of their original States (and therefore continued to vote for Representatives from those States) after the legislation effecting the cession and before the effective date of the cession. They ceased, however, to be citizens of those States (and to vote for Representatives) thereafter. *Id.* at 42a-49a.

The district court also rejected the related contention that current residents of the District of Columbia are entitled to representation as the "political posterity" of the residents at the time the District was created. J.S. App. 49a-52a. The court reasoned that whether or not residents of the area that became the District possessed a right to representation that could not lawfully be revoked, any such right was personal and did not "run with the land." *Id.* at 49a-50a. Further, the court concluded, those residents had no constitutional right to vote for Representatives after the District was created because the Constitution itself provided that they did not. *Id.* at 51a-52a.

The district court further rejected the contention that residents of the District must be allowed the same right to vote that is possessed by residents of federal enclaves that are created by purchase within a State with the consent of its Legislature. Reviewing in detail this Court's decision in *Evans* v. *Cornman*, 398 U.S. 419 (1970), which held that residents of a federal enclave have a right to vote in elections conducted by

the State in which the enclave is located, the district court concluded that enclave residents have voting rights as citizens of the States in which the enclaves are located because Congress has allowed state governance in the federal enclaves. The court explained that Congress has not provided for such state governance with respect to the District and therefore the reasoning of *Evans* does not apply to District residents, who are not citizens of a State. J.S. App. 52a-57a.

The district court then considered appellants' arguments based on provisions of the Constitution other than Article I, Section 2. See J.S. App. 58a-70a. The court first rejected appellants' equal protection claim. The court explained that, as described above, the distinctions between residents of the District of Columbia and residents of the States are required by the Constitution itself. *Id.* at 58a-62a. Similarly, the Constitution affords residents of federal enclaves a right to vote that it denies to District residents who, unlike enclave residents, have not been subjected to state governance. *Id.* at 62a-63a.

Turning to appellants' claim under the Privileges and Immunities Clause of the Fourteenth Amendment, the district court concluded that the privileges of national citizenship guaranteed by the Fourteenth Amendment do not include a right to vote for Representatives that has been withheld from residents of the District of Columbia by Article I, Section 2. See J.S. App. 64a-68a. Similarly, because Article I does not grant District residents a right to vote for Representatives, the court concluded that the failure to permit such voting does not violate either the procedural or the substantive component of the Due Process Clause. *Id.* at 68a.

The district court further determined that the inability of District residents to vote for Representatives

does not violate the Guarantee Clause of Article IV, Section 4. The court questioned whether that claim presents a political question improper for judicial resolution, but concluded that the claim fails, in any event, because the Constitution specifically provides that Congress shall govern the District of Columbia and does not provide for election of Representatives by District residents. J.S. App. 69a-70a.

Judge Oberdorfer concurred in part and dissented in part. J.S. App. 75a-145a. He agreed with the court's rulings with respect to standing and jurisdiction but dissented from its holdings on the merits. *Id.* at 75a n.1, 79a-80a. Judge Oberdorfer recognized that the District is not literally a State, *id.* at 94a, but noted that from 1790 to 1800—the years after Maryland and Virginia ceded the land that would become the District, but before the Seat of Government was moved there—residents of the area continued to vote in national elections in the States that had ceded the land on which they resided. *Id.* at 86a-89a. Judge Oberdorfer would have held that the cession of the land that became the District could not terminate the voting rights of the residents of that land at the time, nor could it terminate those rights with respect to the current residents of the District, who are the "political posterity" of the 18th century residents. *Id.* at 94a-102a. Judge Oberdorfer disagreed with the majority's conclusion that the Constitution's text and historical experience require a different conclusion. *Id.* at 103a-130a. He also would have held that denying District residents the right to vote in congressional elections violates equal protection principles because, in his view, the United States has no legitimate interest in denying that right to residents of the District while granting it to residents of States,

residents of federal enclaves, and overseas voters. *Id.* at 130a-144a.

ARGUMENT

The judgment of the district court is correct and should be affirmed. The relevant constitutional text and history establish that residents of the District of Columbia have no right to representation in the House of Representatives. Moreover, "every other court to have considered the question—whether in dictum or in holding—has concluded that residents of the District do not have the right to vote for members of Congress." J.S. App. 35a. Plenary review is not warranted.[3]

1. The Constitution provides that Members of the House of Representatives shall be chosen by "the People of the several States," U.S. Const. Art. I, § 2, Cl. 1, and that Representatives "shall be apportioned among the several States which may be included within

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[3] We argued in the district court that appellants lack standing because the injury of which they complain is not judicially redressable. As a matter of original principles, we continue to believe that appellants lack standing because the courts have no authority to order the President to perform a task that is not wholly ministerial, and the President's role in the apportionment of Representatives is not wholly ministerial. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 824-828 (1992) (Scalia, J., concurring in part and concurring in the judgment). We agree with the district court, however, that this case is controlled by this Court's decision in *Franklin*, in which the Court (without issuing a majority opinion on the standing issue) held that plaintiffs who raised a similar challenge had standing. See 505 U.S. at 803 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White & Thomas, JJ.) (discussing standing); *id.* at 803-806 (opinion of the Court) (discussing the merits); *id.* at 824 n.1 (opinion of Scalia, J., concurring in part and concurring in the judgment) (concluding that a majority of the Court found standing). We therefore do not ask this Court to dismiss this appeal on standing grounds.

this Union, according to their respective Numbers," *id.* Art. I, § 2, Cl. 3; *id.* Amend. XIV, § 2. The principal question in this case is whether the District of Columbia is one of the "States" referred to in those constitutional provisions.

As the court below recognized (J.S. App. 21a, 94a), the District of Columbia is not literally a "State" for purposes of the Constitution. Justice Jackson explained:

> In referring to the "States" in the fateful instrument which amalgamated them into the "United States," the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed. They obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia being nonexistent in any form, much less a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted.

National Mut. Ins. Co. v. *Tidewater Transfer Co.*, 337 U.S. 582, 588 (1949) (plurality opinion). Accord *id.* at 626 (Vinson, C.J., dissenting); *id.* at 653 (Frankfurter, J., dissenting).

Appellants contend (J.S. 14-15, 19) that the Court should "reject[] the most literal reading of a constitutional provision in favor of one that is more harmonious with the principles enunciated by the document as a whole and in keeping with its underlying purposes." J.S. 14. Departing from the "most literal reading" of

the constitutional text in this case would, however, lead to insurmountable textual difficulties and conflict with both historical evidence and judicial precedent.[4]

Article I, Section 2 of the Constitution provides that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. Art. I, § 2, Cl. 1. But, as the district court explained (J.S. App. 21a-23a), the District (unlike each of the 50 States) does not have a "State Legislature." *Congress* exercises exclusive legislative power over the District. See U.S. Const. Art. I, § 8, Cl. 17.[5] Because the House of Representatives is the more numerous branch of the Congress, treating the District of Columbia as a State in this context would result in the circular requirement that voters for Representatives to the House of Representatives from the District have the qualifications to vote

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[4] Appellants also observe (J.S. 14) that "no article or amendment of the Constitution expressly divests or deprives" District residents of the right to representation in Congress. See also J.S. 16-17 (District Clause does not provide for disenfranchisement). That fact is not surprising, however, because the Constitution gives the right to vote for Representatives only to the people of the "several States" (Art. I, § 2, Cl. 1), which (as explained at pp. 11-13, *infra*) cannot sensibly be read to include the District of Columbia. Thus, there was no right of representation to take away. See also pp. 13-14, *infra* (explaining that the Twenty-third Amendment confirms that the District of Columbia is not a State entitled to Representatives in Congress).

[5] For most of its history, the District had no legislative body other than Congress. See J.S. App. 21a & n.19. Although the District currently has a City Council, Congress has retained ultimate legislative authority over the District. See U.S. Const. Art. I, § 8, Cl. 17; District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 601, 87 Stat. 813 (codified at D.C. Code Ann. § 1-206 (1981)).

for Representatives in the House—"a tautology without constitutional content." J.S. App. 23a.[6]

Article I, Section 2 also provides that Representatives shall be apportioned among "the several States *which may be included within this Union.*" U.S. Const. Art. I, § 2, Cl. 3 (emphasis added). The "Union" includes only those States that ratified the Constitution and additional States admitted to the Union pursuant to the express provision of Article IV, Section 3, Clause 1, which governs the admission of new States; the Union does not include the District, which has never been admitted by Congress to the Union as a State. See *Tidewater*, 337 U.S. at 588 (plurality opinion of Jackson, J.). "Indeed, the 'Seat of Government' contemplated by the Constitution is subsequently described in Article I as a 'District,' in contrast to the 'particular States' whose cessions of territory were expected to create it." J.S. App. 24a (quoting U.S. Const. Art. I, § 8, Cl. 17). And Article I, Section 2 specifically identified the original 13 entities that were considered States at the time the Constitution was adopted and assigned

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[6] As the district court also explained (J.S. App. 26a-27a), appellants' position leads to similar incongruities with respect to the constitutional provisions governing selection of Senators. Under the original text of the Constitution, each State's legislature chose the State's Senators. See U.S. Const. Art. I, § 3, Cl. 1. As we have already noted, however, Congress is the legislature specified by the Constitution for the District. Thus, applying the original constitutional provisions governing selection of Senators to the District would have meant that Congress would itself have chosen the District's Senators. J.S. App. 26a. Under the Seventeenth Amendment, the provisions governing the selection of Senators essentially parallel those concerning Representatives. See *id.* at 27a. Appellants' theory therefore poses problems under the current Senate selection provisions similar to the problems we have discussed above. See *ibid.*; pp. 11-12, *supra*.

each an initial apportionment of Representatives until an "actual Enumeration" of the "respective Numbers" of each State was performed. That provision does not include the District comprising the Seat of Government in either the initial apportionment of Representatives or subsequent apportionments to be made following each decennial census. See U.S. Const. Art. I, § 2, Cl. 3; J.S. App. 24a & n.23.

Significantly, moreover, the Fourteenth Amendment reiterates the command in Article I, Section 2 that "Representatives shall be apportioned among the several States." U.S. Const. Amend. XIV, § 2. By the time that Amendment was ratified in 1868, the practice of not including the District of Columbia in the apportionment of Representatives under the original text of the Constitution was well established. The readoption of that text in the Fourteenth Amendment may properly be regarded as a ratification of that practice and of the constitutional interpretation—that the District of Columbia is not a State (or part of a State) entitled to an apportionment of Representatives —on which it rests. See *District of Columbia* v. *Carter*, 409 U.S. 418, 424 (1973) ("the District of Columbia is not a 'State' within the meaning of the Fourteenth Amendment").

Finally, the text and purposes of the Twenty-third Amendment confirm the correctness of the district court's analysis. Under the Amendment, "[t]he District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct" the number of presidential electors to which it "would be entitled if it were a State." U.S. Const. Amend. XXIII, § 1. The use of the subjunctive in the text makes it clear that the District of Columbia is *not* a State for these purposes. Thus, even if there

were some doubt on the matter under the Constitution as originally adopted, the Twenty-third Amendment establishes in the text of the Constitution itself that the District is not to be regarded as a State or part of a State for the purpose of political representation in the National Government.

The Twenty-third Amendment is of even more direct relevance to this case, however, because the Constitution ties the apportionment of Presidential Electors to representation in Congress. Article II, Section 1, Clause 2 of the Constitution provides that "[e]ach State shall appoint * * * a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. Art. II, § 1, Cl. 2. The situation that was addressed by the Twenty-third Amendment—that, under the Constitution as it then existed, the District of Columbia did not appoint any Presidential Electors—thus necessarily rested on the premise that the District of Columbia is not a "State" that is "entitled" to any Senators or Representatives in Congress. Indeed, in considering this Amendment, Congress specifically recognized that "the District is not a State or a part of a State," H.R. Rep. No. 1698, 86th Cong., 2d Sess. 2 (1960), and that "[t]he proposed amendment * * * would not authorize the District to have representation in the Senate or in the House of Representatives," *id.* at 3.

2. As the district court recognized (J.S. App. 27a-34a), historical evidence further supports the conclusion that the District was not intended to be a State for purposes of apportionment and voting under Article I. At the New York ratifying convention, Thomas Tredwell stated that "[t]he plan of the *federal city*, sir, departs from every principle of freedom * * *

subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 402 (Jonathan Elliot ed., 2d ed. 1888), reprinted in 3 *The Founders' Constitution* 225 (Philip B. Kurland & Ralph Lerner eds., 1987). At that same convention, Alexander Hamilton proposed that the Constitution be amended to provide that when the District's population reached an unspecified number, "[p]rovision shall be made by Congress for having District representation in that Body." 5 *The Papers of Alexander Hamilton* 189-190 (Harold C. Syrett & Jacob E. Cooke eds., 1962). His proposal was not adopted. See J.S. App. 30a.

Moreover, as the district court noted (J.S. App. 30a-33a), the inhabitants of the area that would become the District and the Members of Congress who considered the Organic Act of 1801, ch. 15, 2 Stat. 103, by which Congress assumed exclusive jurisdiction over the District, understood that District residents would not have the right to vote for Representatives or Senators. See, *e.g.*, 10 Annals of Cong. 992 (1801) (remarks of Rep. Smilie); *id.* at 996 (remarks of Rep. Bird); *Enquiries into the Necessity or Expediency of Assuming Exclusive Legislation over the District of Columbia* 15 (1800); Augustus Woodward, *Considerations on the Territory of Columbia* 5-6 (1801). They recognized that District residents could obtain congressional representation only by constitutional amendment, 10 Annals of Cong. 998-999 (1801) (remarks of Rep. Dennis); Woodward, *supra*, at 15, or by retroceding the District to the States (Maryland and Virginia) that had ceded it to the federal

government, 12 Annals of Cong. 487 (1803) (remarks of Rep. Smilie).[7]

As the district court recognized, of perhaps even greater significance is the absence of any evidence of a contrary understanding:

> No political leaders, for example, assured the residents that they would have representation even without constitutional amendment or defeat of the Organic Act. Nor is there any indication that the residents of the new District were surprised when they found themselves without the vote after Congress assumed exclusive jurisdiction in 1801. Indeed, had it been understood that the former citizens of Maryland and Virginia had a right to continue voting for Congress, one would have expected a flood of newspaper articles and lawsuits decrying their unlawful disenfranchisement. Such a reaction, however, is not visible in the historical record.

J.S. App. 34a.[8]

Appellants suggest (J.S. 18) that the fact that the residents of the area that became the District continued

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[7] Eventually, that part of the District that had previously been part of Virginia was retroceded, see An Act to retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35, and its residents became citizens of Virginia, indisputably one of the "several States."

[8] The historical evidence discussed in the text above refutes appellants' suggestion that the Constitution's failure to provide congressional representation for District residents was an "accident" (J.S. 10) or oversight that occurred because the site of the District had not been selected at the time the Constitution was adopted (J.S. 16) and because the District's population was small at the time the cession took effect (J.S. 18-19).

to vote in congressional elections in Maryland and Virginia after the District's creation (but before Congress assumed jurisdiction over it) supports their claim that today's District residents have a right to congressional representation. As the district court explained (J.S. App. 44a-47a), however, the voting history actually supports the contrary conclusion.

Maryland and Virginia authorized the cession of the land for the District in 1788. See J.S. App. 42a. Congress accepted the cession in 1790 in an Act that provided for the "seat of the government of the United States" to "be transferred to the district" on the first Monday in December of 1800. An Act for establishing the temporary and permanent seat of the Government of the United States, ch. 28, § 6, 1 Stat. 130. In that Act, Congress expressly provided that "the operation of the laws of" Maryland and Virginia in the ceded land "shall not be affected by this acceptance" of the cession "until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." § 1, 1 Stat. 130. Consistent with that proviso, residents of the land included in the District continued to vote as citizens of Maryland and Virginia in congressional elections as late as 1800. See J.S. App. 44a-47a.

Indeed, it was not until February 27, 1801, that Congress passed the Organic Act, ch. 15, 2 Stat. 103, which provided for the government and the administration of justice in the District of Columbia. After that time, "the laws of [Maryland and Virginia] ceased having force in the District," and "the states ceased treating District citizens as state citizens eligible to vote in their elections." J.S. App. 44a. Since that time, District residents have not voted in congressional elections. See *id.* at 44a, 89a.

Thus, residents of the area that became the District of Columbia voted in congressional elections in Maryland and Virginia between 1790 and 1800 because they were still citizens of those States subject to their laws during that time. Once they became citizens of the District rather than of the ceding States, they ceased to vote for Representatives in Congress, confirming the general understanding that residents of the District do not have that right.[9]

3. The decision of the district court is supported not only by the constitutional text and history, but also by a

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[9] The voting history is also fatal to appellants' alternative contention (J.S. 20) that they should "be deemed to retain a residual citizenship in Maryland" for purposes of voting in congressional elections. Consistent with the history, the Maryland statute ratifying the cession of the land for the District to the United States ceded "full and absolute right and exclusive jurisdiction * * * of persons residing or to reside thereon." 1791 Md. Acts ch. 45, § 2; see J.S. App. 48a. And, in accordance with both the history and the cession statute, courts have rejected all prior attempts to secure for District residents the right to vote in Maryland elections. *Howard* v. *State Admin. Bd. of Election Laws*, 976 F. Supp. 350 (D. Md. 1996) (plaintiff, a resident of the District and former resident of Maryland, has no right to participate in congressional elections in Maryland), aff'd, 122 F.3d 1061 (4th Cir. 1997), cert. denied, 522 U.S. 1052 (1998); *Albaugh* v. *Tawes*, 233 F. Supp. 576 (D. Md.) (three-judge court) (per curiam) (District residents have no right to vote in Maryland elections generally, and, specifically, in the election of United States Senators for Maryland), aff'd, 379 U.S. 27 (1964) (per curiam). See also *Reily* v. *Lamar*, 6 U.S. (2 Cranch) 344, 356-357 (1805) (Marshall, C.J.) ("[b]y the separation of the district of Columbia from the state of Maryland, [District residents] ceased to be * * * citizen[s] of that state, [their] residence being in the [District of Columbia]"); *Hobson* v. *Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966) ("the effect of cession upon individuals [residing in the District] was to terminate their state citizenship and the jurisdiction of the state governments over them").

uniform body of judicial precedent. As early as 1805, Chief Justice Marshall concluded that the word "state" as used in Article I was intended to encompass only "a member of the union" and therefore did not encompass the District of Columbia. *Hepburn & Dundas* v. *Ellzey*, 6 U.S. (2 Cranch) 445, 452-453 (1805). See also *Palmore* v. *United States*, 411 U.S. 389, 395 (1973) (citing *Hepburn & Dundas* in support of the proposition that "[t]he District of Columbia is constitutionally distinct from the States"). In *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317 (1820), Chief Justice Marshall (for a unanimous Court) held that Congress has the power (either under its general taxing authority or its power to legislate for the District) to lay a direct tax on the District despite the residents' "want of a representative in Congress." *Id.* at 325. In the course of the opinion, the Court concluded that Article I, Section 2, Clause 3, which addresses both the apportionment of direct taxes and Representatives, "is expressly confined to the States" and does not extend to the District. *Id.* at 323. Similarly, in *Heald* v. *District of Columbia*, 259 U.S. 114, 124 (1922), the Court rejected a claim that a federal tax on the intangible property of persons residing or engaged in business in the District was unconstitutional "because it subjects the residents of the District to taxation without representation." The Court recognized that "[r]esidents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation." *Ibid.* Nonetheless, the Court concluded that "[t]here is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation." *Ibid.*

Moreover, in *Hepburn* and later cases, this Court has recognized that the term "State" as used in a variety of

constitutional provisions does not encompass the District of Columbia. *Hepburn*, 6 U.S. (2 Cranch) at 453 (the term "State" as used in the diversity jurisdiction clause of Article III does not encompass the District); *Carter*, 409 U.S. at 424 ("the District of Columbia is not a 'State' within the meaning of the Fourteenth Amendment"); *Tidewater*, 337 U.S. at 588 (plurality opinion of Jackson, J.) (reaffirming that the District is not a "State" for purposes of Article III); *id.* at 626 (Vinson, C.J., dissenting) (same); *id.* at 653 (Frankfurter, J., dissenting) (same). See also *Metropolitan Washington Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 278 n.1 (1991) (White, J., dissenting). Indeed, we are aware of no decision holding that the District is a "State" within the meaning of Article I.[10]

The cases on which appellants rely (J.S. 15-16) do not support the conclusion that the District is a "State" for purposes of Article I, Section 2. In *Carter*, the Court held that the District is not a "State or Territory" for purposes of 42 U.S.C. 1983. 409 U.S. at 419. The Court reasoned that Section 1983 was intended to effectuate the Fourteenth Amendment, and that the Fourteenth Amendment applies only to "States," not to the District. See 409 U.S. at 423-424. Although *Carter* con-

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[10] Appellants contend (J.S. 10, 11, 14, 28) that plenary review is warranted because the district court considered itself bound by the precedents cited above and in note 9, *supra*. As described at pp. 5-7, *supra*, however, the district court did not merely invoke those precedents; it carefully considered the constitutional text and history and determined that it would have reached the same conclusion as an independent matter. See J.S. App. 19a-34a, 42a-56a. At the very least, the district court's thorough analysis establishes that there is no basis for this Court to grant plenary review to reexamine any of the controlling precedents.

cerned Section 1983, which was enacted to enforce Section 1 of the Fourteenth Amendment, the Court's interpretation of the term "State" in the Fourteenth Amendment to exclude the District of Columbia presumably also includes Section 2 of the Amendment, which provides that "Representatives shall be apportioned among the several States according to their respective Numbers." U.S. Const. Amend. XIV, § 2.

Appellants' reliance on *Tidewater* is similarly misplaced. The Court in that case upheld a federal statute that conferred jurisdiction on the federal district courts over civil actions between citizens of the District and citizens of a State. But Justice Jackson based his plurality opinion on Congress's exclusive legislative power over the District and the Necessary and Proper Clause. See 337 U.S. at 588-604. Seven Justices reaffirmed Chief Justice Marshall's conclusion that the District is not a "State" for purposes of Article III. *Id.* at 588 (plurality opinion of Jackson, J.); *id.* at 626 (Vinson, C.J., dissenting); *id.* at 653-654 (Frankfurter, J., dissenting). Only Justices Rutledge and Murphy would have overruled prior precedent and held that the District is a "State" for purposes of the Diversity Clause of Article III. *Id.* at 625-626 (Rutledge, J., concurring). And even those two Justices appeared to distinguish between the Diversity Clause and "the purely political clauses," such as Article I, Section 2. J.S. App. 37a (quoting *Tidewater*, 337 U.S. at 619-623 (Rutledge, J., concurring)).

Appellants' reliance on cases applying the Sixth Amendment and the Full Faith and Credit Clause to judicial proceedings in the District is also misplaced. As explained above, see pp. 11-20, *supra*, treating the District as a State for purposes of congressional representation would create insurmountable textual difficul-

ties and would conflict with history and precedent. That is not true with respect to the results reached in the Sixth Amendment and Full Faith and Credit Clause cases.[11]

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[11] Moreover, in none of the cases cited by appellants did the Court expressly state that the word "State" in either the Sixth Amendment or the Full Faith and Credit Clause encompasses the District. Indeed, the Court has explained that the obligation of state courts to accord full faith and credit to the judgments of the courts of the District of Columbia is based on Congress's exercise of its exclusive legislative authority over the District under Article I, not the Full, Faith and Credit Clause of Article IV. *Embry* v. *Palmer*, 107 U.S. 3, 9-10 (1883). See also *Mills* v. *Duryee*, 11 U.S. (7 Cranch) 481, 483 (1813) (noting that courts of the District were required to give full faith and credit to the judicial records and proceedings of other courts by virtue of a federal statute that applied by its terms to "every Court within the United States"); 28 U.S.C. 1738. The Court in *Loughran* v. *Loughran*, 292 U.S. 216, 228 (1934), later observed that "courts of the District are bound, equally with courts of the States, to observe the command of the full faith and credit clause, wherever applicable." But the Court made no reference to *Embry*, and placed sole reliance on a case that did not involve the courts of the District of Columbia. See 292 U.S. at 228 (citing *Bradford Elec. Light Co.* v. *Clapper*, 286 U.S. 145, 155 (1932)).

With respect to the right to trial by jury, the Court's decision in *Callan* v. *Wilson*, 127 U.S. 540, 550 (1888), that District residents possess that right rested on the jury trial guaranty of Article III, Section 2, Clause 3, which provides for trial by jury in crimes "not committed within any State." U.S. Const. Art. III, § 2, Cl. 3. The Court rejected the argument that the Sixth Amendment was intended to supplant Article III and limit the jury trial right to the residents of the States. 127 U.S. at 549-550. The Court held instead that Article III guarantees a jury trial "according to the settled rules of common law" and the Sixth Amendment "is to be taken as a declaration of what those rules were." *Id.* at 549. Likewise, both *District of Columbia* v. *Clawans*, 300 U.S. 617, 624 (1937), and *District of Columbia* v. *Colts*, 282 U.S. 63, 72 (1930), cite the jury trial guaranty of Article III.

4. Appellants contend (J.S. 11-14) that plenary review is warranted because the decision below conflicts with this Court's cases reviewing redistricting decisions of state legislatures. There is no conflict. The "one person, one vote" principle that governs the redistricting cases (see *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Reynolds* v. *Sims*, 377 U.S. 533 (1964)) has no application here. Under the plain terms of the Constitution, District residents are not afforded representation in Congress. As the district court explained (J.S. App. 60a-62a), the principle of "one person, one vote" has never been held to override the representation scheme established by the Constitution itself. Applying the one person, one vote principle in that manner would destroy the fundamental compromise that made the adoption of the Constitution possible. Indeed, the Senate and the Electoral College do not comport with the "one person, one vote" principle, but that does not render them unconstitutional. See *Reynolds*, 377 U.S. at 574-575 (rejecting analogy to constitutional compromise that resulted in establishment of United States Senate in invalidating state legislative apportionment plan that allotted one state senate seat to each county); *Gray* v. *Sanders*, 372 U.S. 368, 378 (1963) (rejecting analogy to Electoral College in invalidating system for counting votes in state primary election that resulted in similar numerical inequalities).

Even with respect to the apportionment of Representatives in the House of Representatives, the federal body that was intended to be the most representative of individual citizens, the one person, one vote rule is subject to significant constitutional exceptions. As this Court has explained, "the Constitution makes it impossible to achieve population equality among inter-

state districts" by providing that "[t]he number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines." *Wisconsin* v. *City of New York*, 517 U.S. 1, 17 (1996) (quoting *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 447-448 (1992)). Thus, the Court has already held that significant deviations from the one person, one vote principle are permitted when those deviations result from application of the Constitution itself. Compare *Montana*, 503 U.S. at 462 n.40 (noting that applicable constitutional constraints result in Montana congressional district(s) deviating from the size of districts in other States by over 40%) with *Karcher* v. *Daggett*, 462 U.S. 725 (1983) (applying one person, one vote principle to invalidate congressional districts in New Jersey because a 1% difference in population was too great).

5. Appellants' other claims also lack merit. Appellants contend (J.S. 21-23) that residents of the District of Columbia are denied the equal protection of the laws because they lack the right to vote in congressional elections while the residents of the States possess that right. As the district court explained, however, that difference in treatment is "one drawn by the Constitution itself." J.S. App. 60a. The right to vote in congressional elections is delineated by Article I, Section 2. See *Wesberry*, 376 U.S. at 17 (Article I, Section 2 "gives persons qualified to vote a constitutional right to vote and to have their votes counted."); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[T]he right to vote in federal elections is conferred by Art. I, § 2, of the Constitution."). And, as discussed above, Article I, Section 2 gives voting rights to the people of the 50 States but does not confer voting rights on residents of

the District of Columbia. That distinction, because it is made by the Constitution itself, cannot constitute a denial of the equal protection of the laws.[12]

Appellants further contend (J.S. 23-24) that equal protection principles require that residents of the District of Columbia be treated the same as residents of federal enclaves. But District residents are not situated similarly to residents of federal enclaves. Federal enclaves are located entirely within States, and the residents of an enclave are properly considered state residents. See *Evans* v. *Cornman*, 398 U.S. 419, 421 (1970). Enclaves are temporary in nature; when the areas are no longer needed for federal purposes, control over the land generally is returned to the State. See *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 564 & n.11 (1946); *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 542 (1885). By contrast, the District is the "permanent" seat of the federal government, *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 104 (1953), "as lasting as the States from which it was carved or the union whose permanent capital it became." *O'Donoghue* v. *United States*, 289 U.S. 516, 538 (1933); see § 1, 1 Stat. 130 (accepting the District "for the permanent seat of the government of the United States"). Indeed, the text of the Constitution itself indicates that an enclave remains part of the State in which it is located while the District is ceded to the federal

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[12] Appellants' substantive due process claim (see J.S. 24-25) and their claim based on the Privileges or Immunities Clause of the Fourteenth Amendment (see J.S. 26-28) fail for similar reasons. Because the Constitution itself does not grant District residents the right to vote in congressional elections, the failure to accord District residents that right is neither a deprivation of liberty without due process of law (see J.S. App. 68a) nor a denial of a privilege of national citizenship (see *id.* at 65a-66a).

government. See U.S. Const. Art. I, § 8, Cl. 17 (referring to the "State in which [an enclave] shall be" but to the formation of the District by "Cession of particular States").

Finally, appellants' procedural due process claim (J.S. 25-26) similarly lacks merit. Contrary to appellants' suggestion (J.S. 25), the Constitution specifically empowers Congress to enact legislation affecting residents of areas that lack congressional representation. The Constitution vests Congress with exclusive legislative authority over both the District and the Territories. See U.S. Const. Art. I, § 8, Cl. 17; *id.* Art. IV, § 3, Cl. 2. The procedural component of the Due Process Clause does not require that citizens of the District of Columbia and the Territories be permitted to vote in congressional elections before Congress can exercise the plenary authority that the Constitution grants it over those areas.[13]

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[13] In their jurisdictional statement to this Court, appellants do not press the claim under the Guarantee Clause of Article IV, Section 4, that they raised in the district court. In any event, the district court correctly rejected that claim, which is not justiciable and, if justiciable, lacks merit. See J.S. App. 69a-70a (rejecting claim on the merits); *Baker* v. *Carr*, 369 U.S. 186, 218-227 (1962) (explaining why most claims under the Guarantee Clause are not justiciable).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CLIFFORD ALEXANDER, *et al.*,

Appellants,

v.

WILLIAM M. DALEY, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF AMICUS CURIAE FOR THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE FOR THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy.[1] The League is organized in more than a

[1] This brief is filed with consent of the parties, and copies of the consent letters have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. Sup. Ct. R. 37.6.

thousand communities in every state and has more than 125,000 members and supporters nationwide. The League was organized in 1919 as an outgrowth of the 72-year struggle to win voting rights for women in the United States.

As part of its support for District of Columbia self-government since 1938, the League has been instrumental in securing the following for District citizens: the right to vote for President and Vice-President; the right to elect a nonvoting delegate to Congress in 1970; and the limited home-rule charter providing for an elected mayor and city council adopted in 1973. The League specifically has advocated full voting representation for District citizens since 1982.

The League thus has a strong and direct interest in this case. Protecting and enhancing voting rights for all Americans has been the primary goal of the organization since its inception. The League believes that full voting representation is a fundamental right that must be afforded all citizens to secure both the individual liberty of each and the legitimacy of the social order for all.

SUMMARY OF ARGUMENT

Representative democracy is the bedrock principle on which our nation was founded, and it is the principle that defines the relationship of all U.S. citizens to their government – with the notable exception of the 600,000 citizens who reside in the District of Columbia. District citizens, alone among Americans otherwise qualified to vote, are denied the right to elect a voting member to represent their views in the U.S. Congress. The League is aware of no other situation where qualified U.S. citizens are denied the right to vote based on where they live.

This unique anomaly, preserved by a 2-1 vote in the District Court below, is inconsistent with both our country's foundational documents and this Court's long-

standing jurisprudence recognizing the primacy of the right to vote. The decision below cannot be squared with the Declaration of Independence, which teaches that our government's "just powers" are derived from the "consent of the governed." DECLARATION OF INDEPENDENCE, para. 2, cl. 2. It also ignores the Preamble to the Constitution, which begins "We the people," U.S. CONST. pmbl., and proclaims that it was "the people" who "ordain[ed] and establish[ed]" our constitutional system. *Id.*

As detailed below, the bedrock principle at the heart of the American system of government – that a "just" government derives its power through meaningful participation of its citizens, *i.e.*, "the consent of the governed" – is deeply embodied in our country's foundational documents. Because the District Court's crabbed reading of the Constitution conflicts with those documents and the intent of the Framers, it must be reviewed and reversed by this Court. *See* Point I, *infra*.

This Court's decisions have been critical to the implementation of the Framers' vision of a representative democracy. The Court repeatedly has protected the right to vote, requiring, for example, that congressional districts be apportioned so that each citizen can participate on equal terms with her neighbors. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964) (enunciating "one person one vote" standard). It similarly has rejected efforts to make voting more difficult for certain members of society, *e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional), or, most recently, to disqualify certain representatives based on prior service in Congress. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). The District Court erred by ignoring those precedents. *See* Point II, *infra*.

This Court also has rejected efforts to exclude from full participation in our democracy certain citizens because of where they live. *See, e.g., Evans v.*

Cornman, 398 U.S. 419 (1970) (holding unconstitutional Maryland law that denied the right to vote in state elections to residents of the federal enclave at the National Institutes of Health). This Court granted review in *Evans* even though only a small number of persons' voting rights were at stake, because it recognized that the vote serves as the essential "link" between a citizen and "his laws and government" and, in that way, "is protective of all fundamental rights and privileges." *Id.* at 422 (citations omitted). It should do the same here. *See* Point III, *infra*.

The ruling below is a direct challenge to the foundational principle repeatedly affirmed by this Court. In its decision, the District Court majority determined that it was precluded from addressing the inequity inherent in denying plaintiffs the right to select a voting representative by "longstanding judicial precedent, as well as the Constitution's text and history." App. at 71a. Amicus submits that nothing mandates the result below, and that in fact the only way to harmonize the text of the Constitution, its history, and this Court's precedents is to hold that citizens who reside in the District, like United States citizens who live elsewhere, have the right to elect voting representatives to Congress in proportion to their number. *See* Point IV, *infra*.

At the very least, the question of whether U.S. citizens who reside in the District are entitled to voting representation in Congress is an important one that deserves an answer from this Court. Not only have significant voting rights issues traditionally been resolved by this Court, but this Court stands as the appropriate arbiter of issues relating to the basic structure and operation of our constitutional system. Whether that system will continue effectively to disenfranchise over half a million citizens because they reside in the District and to operate so contrary to the bedrock principle on which it rests is an issue this Court should decide.

ARGUMENT

I. THE DECISION BELOW CANNOT BE SQUARED WITH THE FRAMERS' INTENT THAT ALL CITIZENS HAVE VOTING REPRESENTATION IN THE FEDERAL GOVERNMENT.

The district court's decision relied heavily on Article I, § 2, cl. 1 of the Constitution, which provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the Several *States*." U.S. CONST., art. I, § 2, cl. 1 (emphasis added). *See* App. at 17-58a. In relying on the Framers' use of the word "States" to deny District residents the right to a voting representative, however, the District Court failed to take adequate account of the great weight of the evidence, both historical and textual, which requires a different result.

It cannot seriously be disputed that the Framers viewed the right to elect representatives as an essential, if not the critical, component of the republican form of government. Thus, James Madison wrote in *The Federalist* No. 52 that "the right of suffrage is very justly regarded as a fundamental article of republican government." *The Federalist* No. 52, at 326 (Clinton Rossiter ed., 1961); *see also The Federalist* No. 9, at 72-73 (A. Hamilton) (stating that "the representation of the people in the legislature by deputies of their own election" is an essential quality of our system of government). Moreover, the Framers viewed a representative's ties to his or her particular constituents as being of great importance in preserving the right of the people to consent to the rule of those who governed them. Madison explained that "it is essential to liberty that the government in general should have a common interest with the people [and that Congress] should have an immediate dependence on, and an intimate sympathy with, the people." *The Federalist* No. 52, at 327; *see also The Federalist* No. 35, at 216 (A. Hamilton) ("This

dependence, and the necessity of being bound himself, and his posterity, by the laws to which he gives his assent, are the true, and they are the strong chords of sympathy between the representative and the constituent."); *The Federalist* No. 56, at 346 ("It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents.").

Significantly, the Framers viewed the right to participate in the government through the election of voting representatives as the "full answer" to concerns that a national government would be so powerful as to invite abuse and tyranny:

> [I]t is a full answer . . . to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, only efficacious security for the rights and privileges of the people, which is attainable in civil society.

The Federalist No. 28, at 180 (A. Hamilton) (footnote omitted).

Finally, the Framers intended that these rights and protections be enjoyed by *all* of the people. Madison criticized the British House of Commons, in which "so great a proportion of the members are elected by so small a proportion of the people;" in contrast, the Framers envisioned a republic in which the representatives would be "elected FREELY by the WHOLE BODY of the people." *The Federalist* No. 41, at 259-60 (J. Madison); *see The Federalist* No. 57, at 351 ("Who are to be the electors of the federal representatives? . . . *The electors are to be the great body of the people of the United States.*") (emphasis added). Accordingly, from a perspective barely three decades removed from the constitutional debates, this Court recognized that the United States government "is emphatically, and truly, a government of the people. In

form and in substance it emanates from them. Its powers are created by them, and are to be exercised directly on them, and for their benefit." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819).

More recently, the Court wrote of the Constitutional Convention that "[o]ne principle was uppermost in the minds of many delegates: that, *no matter where he lived,* each voter should have a voice equal to that of every other in electing members of Congress." *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964) (emphasis added). This principle is squarely reflected in the text of the Constitution itself: Article I, section 2, clause 1 provides for election of members of the House of Representatives by "*the People* of the several States." U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

The District Court ignored these principles by limiting the right to vote to those who reside in "States" as opposed to the District of Columbia. Even if the entire text and focus of the Constitution were to be ignored in favor of an undue focus on the word "States" (as opposed to "People") in Article I, Section 2, Clause 1, the District Court recognized that the word "States" in the Constitution itself has been given different meanings depending on the applicable context. App. at 17-19a. The District Court specifically noted that "the Supreme Court has on occasion interpreted the constitutional term 'state' to include the District." *Id.* at 19a. (citing *Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (holding that references in the Full Faith and Credit Clause to "each State" and "every other State" include the District of Columbia)); *see Callan v. Wilson*, 127 U.S. 540, 550 (1888) (holding that right to trial by jury extends to residents of the District).

This Court's interpretations of numerous other provisions in the Constitution referencing the "States" have likewise read the word to include the District. *See, e.g., District of Columbia v. Carter*, 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a

'State or Territory' within the meaning of any particular . . . constitutional provision depends upon the character and aim of the specific provision involved."); *Loughborough v. Blake*, 18 U.S. 317, 320-22 (1820) (refusing to exclude the District from the apportionment of direct taxes despite the "several States" language of Article I).

The Court below gave no meaningful guidance to distinguish when the District should be appropriately treated as a State for constitutional purposes and when it should not, and yet it rested its decision on that distinction. Therefore, it is critical for this Court to square its own precedents – and the clear intent of the Framers – with the decision of the lower court, in an effort to underscore the importance of the franchise to *all* American citizens resident in the federal system.

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S RECOGNITION OF THE IMPORTANCE OF THE RIGHT TO VOTE TO THE PROPER FUNCTIONING OF OUR FEDERAL SYSTEM.

In light of the fundamental nature of the right at issue, the impact of this case extends far beyond the borders of the District of Columbia and warrants review. As Judge Oberdorfer noted in his dissent below, "[t]he importance of voting by the people in a representative democracy, such as the Constitution established, is so obvious that it is difficult to articulate its provenance." App. at 125a. Given the obvious importance of suffrage in a republican form of government, it is not surprising that "[i]n decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

Indeed, for more than a century, this Court's decisions have repeatedly and consistently affirmed that the right

of suffrage is a bedrock principle of our democracy. *See Ex parte Yarbrough*, 110 U.S. 651, 664 (1884) ("[T]he right of suffrage was considered to be of supreme importance to the national government."); *Twining v. State of New Jersey*, 211 U.S. 78, 106 (1908) ("[I]t must not be forgotten that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will."), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964).

As the Court has explained, voting rights are of primary importance because every other civil right depends upon the right to vote:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Wesberry, 376 U.S. at 17-18. *See also Plyler v. Doe*, 457 U.S. 202, 233 (1982) ("[A] citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process.") (Blackmun, J., concurring); *Reynolds*, 377 U.S. at 562 ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting is . . . a fundamental political right, because [it is] preservative of all rights.").

The Court thus has consistently reviewed voting rights decisions in order to recognize the validity of laws promoting voting rights while striking down those that unconstitutionally restrict suffrage. For example, in *Ex parte Siebold*, 100 U.S. 371 (1879), the Court affirmed Congress' power to enact statutes that protect the right

to vote by punishing unlawful interference with elections, noting that "[t]he due and fair election of . . . representatives is of vital importance to the United States." *Id.* at 388. In *Nixon v. Herndon*, 273 U.S. 536 (1927), and *Smith v. Allwright*, 321 U.S. 649 (1944), the Court invalidated "white primary" rules which excluded African-Americans from participating in primary elections. Likewise, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court declared unconstitutional racially-based gerrymandering.

The Court's apportionment cases also have expressed eloquently the enduring importance of the right to vote in a free society:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

Reynolds, 377 U.S. at 555; *see id.* at 562 ("[T]he right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.").

In addition, the Court's more recent jurisprudence has continued to recognize that the right to vote is the foundation upon which our democracy rests. For example, in striking down a signature requirement for independent candidates seeking access to the ballot in Chicago, the Court wrote that "for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (citations omitted). Similarly, in upholding a Tennessee statute regulating the display or distribution of voting materials at polling places, the Court explained that the right to vote is "a right at the heart of our democracy." *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

In light of such decisions, this case presents a compelling instance in which this Court is called upon to reaffirm the fundamental importance of access to the ballot. To "achieve any meaningful degree of individual political equality," *Plyler*, 457 U.S. at 233 (Blackmun, J., concurring), the citizens who live in the District must be able to participate fully in choosing their elected representatives.

III. THIS COURT REGULARLY HAS REVIEWED CASES IN WHICH PERSONS HAVE BEEN DENIED THE VOTE, BECAUSE OF THE FUNDAMENTAL SIGNIFICANCE OF VOTING RIGHTS IN DEMOCRATIC SOCIETY.

This Court has recognized the fundamental significance of the right to vote and has granted review in numerous cases involving significantly fewer citizens than are presented here. The current case involves the complete disenfranchisement of hundreds of thousands of U.S. citizens in the Nation's capital. Yet the Court consistently has reviewed cases affecting much smaller numbers of citizens and less significant offices, in light of the importance of protecting the franchise in all circumstances and for all citizens. Moreover, the Court frequently has reviewed the effect of state residency requirements on the right to vote. Therefore, the Court should decide the question of fundamental significance presented in this case, as it has decided numerous voting rights claims involving fewer citizens and lesser stakes.

In *Evans v. Cornman*, 398 U.S. at 419, the Court reviewed a Maryland statute that denied the right to vote in state elections to the residents of the National Institutes of Health ("NIH"), a federal enclave located in Montgomery County, Maryland. Though only a small number of people were affected, the Court granted review and invalidated the state statute. The Court explained that NIH residents had the right to vote in Maryland state elections, because, *inter alia*, "the right to vote, as the citizen's link to his laws and government,

is protective of all fundamental rights and privileges." *Id.* at 422 (citing *Yick Wo*, 118 U.S. at 370; *Wesberry*, 376 U.S. at 17).[2]

This Court has examined voting procedures affecting small numbers of citizens in other contexts as well. For example, in reviewing preclearance of district boundaries under the Voting Rights Act, the Court affirmed claims of voting discrimination when Pleasant Grove, Alabama (with a population of approximately 7,000) proposed to annex two parcels of land – one vacant, and one inhabited solely by a single extended family – but not another parcel inhabited by black residents. *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987). *See also City of Lockhart v. United States*, 460 U.S. 125 (1983) (denying approval to election plan for city council of Lockhart, Texas, a

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[2] Significantly, federal authority over the District of Columbia and federal enclaves is grounded in the same provision in the Constitution. *See* U.S. CONST. art. 1 § 8 cl. 17 (providing for Congress's legislative jurisdiction over the District and "all Places purchased . . . for the erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"). The majority below distinguished *Evans* by contrasting Congress's delegation of authority over the NIH enclave to Maryland, and Maryland's exercise of that authority, with Congress's authority over the District. A mere decision by Congress or a state to exercise legislative authority, however, cannot operate to deprive a class of individuals of a fundamental right, or deny them equal protection of the laws, unless it survives strict scrutiny. *See, e.g., Evans*, 398 U.S. at 422 ("[T]here can be no doubt . . . that 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'") (quoting *Harper*, 383 U.S. at 665); *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933) ("[T]he District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution. . . . We think it not reasonable to assume that the cession stripped them of these rights."). There admittedly is no "compelling justification for denying District residents the right to vote in Congress." App. at 59a.

community of less than 8,000 people); *City of Rome v. United States*, 446 U.S. 156 (1980) (affirming denial of preclearance when Rome, Georgia sought to annex 13 parcels of land, 9 of which were vacant).

In fact, the Court has made clear the need to subject infringements of voting rights to "close and exacting examination," noting that "[s]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, *any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.*'" *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (quoting *Reynolds*, 377 U.S. at 562) (emphasis added). In *Kramer*, for instance, the Court overturned a New York law restricting voting on certain school district offices to landowners and parents of public school children, even though the restrictions applied only to school board elections in districts holding annual school board meetings. *Kramer*, 395 U.S. at 623.

Moreover, even when voting limitations are applied only to single state or local offices, this Court has reviewed the challenges because of the fundamental importance of the right to vote. Last Term in *Rice v. Cayetano*, 120 S. Ct. 1044 (2000), the Court reviewed and struck down a Hawaii law restricting the class of people who could vote for the trustees of the Office of Hawaiian Affairs, a state agency administering programs for descendants of the early inhabitants of the Hawaiian islands. The Court noted the constitutional significance of protecting the rights of all citizens at "the most basic level of the democratic process, the exercise of the voting franchise." *Id.* at 1053-54. Similarly, in *Ball v. James*, 451 U.S. 355 (1981), the Court upheld an Arizona statute allowing only certain landowners to vote for the directors of a water reclamation district. The plaintiffs there were the very limited class of registered voters within the geographic boundaries of the water reclamation district who owned less than one acre of

land and were thus excluded from voting under the statute. *Id.* at 360. And in an electoral scheme involving even fewer people, this Court upheld claims that a local statutory formula for election of junior college district trustees resulted in the dilution of the votes of residents of a few larger school districts. *See Hadley v. The Junior College Dist. of Metro. Kansas City, Missouri*, 397 U.S. 50 (1970). *See also Hill v. Stone*, 421 U.S. 289 (1975) (overturning state and city laws limiting the right to vote in Fort Worth, Texas bond issue elections to citizens who had rendered property for taxation); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (overturning a Louisiana law allowing only property taxpayers to vote in elections to approve the issuance of revenue bonds by the municipal utility system).

This Court also has reviewed state residency requirements to determine if they unlawfully exclude citizens from the franchise. In *Dunn*, 405 U.S. at 330, the Court sustained a challenge to Tennessee's residency laws which required voters to live in the state for a full year before voting. The Court found it significant that "[d]urational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of 'a fundamental political right, . . . preservative of all rights.'" *Id.* at 335-36 (quoting *Reynolds*, 377 U.S. at 562). Similarly, the Court overturned a state law restricting military personnel who moved to Texas from voting in Texas elections as long as they remained active members of the armed forces. *Carrington v. Rash*, 380 U.S. 89 (1965). The *Carrington* Court found that the law impinged on "matters close to the core of our constitutional system." *Id.* at 96. *See also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (reviewing and ultimately denying claims of a small unincorporated community in Tuscaloosa, Alabama, which argued that it should be allowed to vote in the Tuscaloosa local

elections while subject to certain city jurisdiction); *Burns v. Fortson*, 410 U.S. 686 (1973) (upholding Georgia statute requiring registrars to close voter registration books 50 days before general elections).

The Court's regular review of claims of disenfranchisement, even when they involve relatively few citizens and lesser local offices, reflects the central place of voting in our constitutional democracy. The claims presented here challenge the complete exclusion of hundreds of thousands of American citizens from any form of voting representation in the U.S. Congress. The exclusion of those citizens merely because they reside in the Nation's capital from participation in our federal system should not rest on the vote of a single district court judge. Accordingly, this Court should grant review of the decision below.

IV. THIS COURT'S PLENARY REVIEW OF THE ACTION IS ESSENTIAL.

Plenary review of the trial court's decision is also appropriate because no other forum exists for a meaningful consideration of the fundamental issues in dispute. This Court alone has the institutional authority to address the profound legal questions that divided the panel below and to resolve the constitutional issues that have evaded a political solution for more than 120 years.

A. The Court Should Grant Plenary Review Because The Appeal Presents Profound Legal Issues That Must Be Resolved.

This Court has never before been asked squarely to decide whether United States citizens resident in the Nation's capital are entitled to voting representation in the United States Congress.[3] That issue is clearly an

[3] In *Loughborough*, 18 U.S. at 317, the Court held that Congress's general power of taxation was broad enough to cover a direct tax on the District of Columbia. The Court concluded that this power was not limited by the "want of a representative [from the District] in Congress," but also acknowledged that "it might be

"important question of federal law that has not been, but should be, settled by this Court," and is therefore deserving of plenary appellate review. Sup. Ct. R. 10(c). Indeed, the difficulty and importance of the question is underscored by the profound division of the three-judge court below.[4] The Court thus should require full briefing and oral argument on the merits of this grave and substantial question – not only for the unique constitutional enigma it poses, not only to reaffirm the rights of disenfranchised citizens most subject to congressional control, but also, most critically, for the integrity of the Nation's system of governance.

Because it involves the fundamental voting rights of hundreds of thousands of citizens, freely exercised for a decade but later denied by Congressional action, this case is peculiarly within this Court's purview. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167-75 (1803) ("The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."). This is especially true because the dispute as to the meaning of Article I conflicts with the affirmative mandates of the Bill of Rights and implicates opposing constitutional considerations.

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more congenial to the spirit of our institutions to admit a representative from the district." *Id.* at 324-25. *See also Heald v. District of Columbia*, 259 U.S. 114 (1922) (upholding Congressional taxing authority despite lack of political representation). In a case involving a challenge by a losing candidate for U.S. Senator from Maryland, the Court summarily affirmed a *per curiam* judgment that District of Columbia residents were not entitled to vote in elections in Maryland. *See Albaugh v. Tawes*, 233 F. Supp. 576 (D. Md.), *aff'd mem*, 379 U.S. 27 (1964).

[4] While the panel below agreed that the plaintiffs' "grievances are serious," App. at 2a, the majority interpreted "longstanding judicial precedent as well as the Constitution's text and history" to preclude the panel's authority to grant relief. *Id.* at 71a. In dissent, Judge Oberdorfer harmonized the Constitutional text and history with this Court's unflinching mandate in favor of fundamental voting rights, and saw no bar to relief. *Id.* at 75-145a.

Moreover, while the judgment below rested in part on what the District Court perceived as binding statements of this Court, *see* App. at 71a, not all of those pronouncements were entitled to the precedential weight they were accorded. In fact, many of the cases cited by the majority below included no more than *dicta* and legal fictions.[5]

If U.S. citizens – simply because they reside in the Nation's capital – are to be denied voting representation in the People's house of the national legislature, they have a right to more than *dicta* and legal fictions from a 2-1 majority in the trial court. They have a right to a foursquare ruling from their Supreme Court.

B. The Court Should Grant Plenary Review Because It Alone Can Decide Fundamental Questions That The Political System Has Been Unable To Resolve.

The right to vote is ultimately a *constitutional* privilege not subject to the vagaries of political discourse, and the very nature of our political system creates strong disincentives to any change in the current, and unconstitutional, status quo. It is particularly vital, therefore, that this Court exercise its "province and duty . . . to say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 177, by settling the legal debate as to whether the Constitution itself requires an extension of the franchise to the residents of the Nation's capital.

U.S. citizens residing in the District have struggled to achieve fair representation in the political process for more than 120 years, dating from congressional decisions in the 1870s that confined the "municipal

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[5] The majority relied heavily on *Loughborough*, 18 U.S. at 317 (in *dicta*, indulging in the legal fiction that the District "has voluntarily relinquished the right of representation"), *Albaugh*, 379 U.S. at 27 (a one-sentence affirmance of a three-page *per curiam* lower court opinion), and *Evans*, 398 U.S. at 421 (indulging in the fiction that a federal enclave remained part of the original state).

government . . . to mere administration." *Metropolitan R. Co. v. District of Columbia*, 132 U.S. 1, 7 (1889). *See* Act of June 11, 1878, 20 Stat. 102, ch. 180 (allowing a Board of Commissioners appointed by the President to assume control of most city functions, and removing the District's right to elect a non-voting delegate to the House of Representatives.) In subsequent years, Senate officials argued that "the District should participate in national affairs" through elected representation, S. Doc. No. 61-653, at 9 (1910), and the issue of statehood for the District was addressed in numerous hearings before the House and the Senate. *See* H.R. Rep. No. 102-909, at 9 (1992). But it was not until 1973 – nearly 100 years after the District's first City Council was displaced – that Congress even created a limited brand of "home rule" to enable District residents to elect their own mayor and city council without presidential oversight. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code Ann. §§ 1-201 to 1-299.7 (1981)). [6]

As a result, the legislative process has failed for more than a century to secure the fundamental right to vote in congressional elections for U.S. citizens who reside in the District. From 1878 until 1977, Congress rejected more than 150 proposals seeking voting representation for the District. *See* Orrin G. Hatch, *Should the Capital Vote in Congress? A Critical Analysis of the Proposed D.C. Representation Amendment*, 7 Fordham Urb. L.J. 479, 495 & n.69 (1979). Likewise, although seventy percent of Americans support congressional voting

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[6] The 1973 "home rule" legislation was passed only after Congress had defeated more than twenty-three similar proposals for District self-governance in prior years. *See* Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 Geo. L.J. 207, 256-57 & nn.171-77 (1957-58).

rights for the District, *see Metro In Brief: The District*, WASH. POST, Apr. 13, 2000, at B3, every recent proposal to guarantee full and equal voting rights to U.S. citizens living in the District has been rejected. *See, e.g.*, H.R. Rep. 102-909, at 9-12 (reciting a modern history of suffrage efforts in the District); 139 Cong. Rec. H10574-75 (Nov. 21, 1993) (reflecting the defeat of the New Columbia Admissions Act, which would have admitted portions of the District into the Union as the State of New Columbia).

Consequently, "the record shows that every means of granting the franchise to the citizens of the District of Columbia . . . has failed." H.R. Rep. 102-209, at 10 (quotation omitted). Ever since the creation of the Board of Commissioners in the 1870s, the political system has perpetuated a tradition of disenfranchisement for District residents. It is not an answer, therefore, to insist that a political forum will afford District residents the constitutional protections that they deserve. Rather, it is this Court's opportunity – and this Court's obligation – to do what the clearly divided court below did not: to resolve once and for all whether U.S. citizens residing in the District have a fundamental right to vote in congressional elections.

CONCLUSION

For all the foregoing reasons, this Court should note probable jurisdiction of the decision of the trial court.

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CLIFFORD ALEXANDER, ET AL.,

Appellants,

V.

NORMAN Y. MINETA, ET AL.,

Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' OPPOSITION TO THE MOTIONS TO AFFIRM

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Appellants oppose the motions of the federal Government and the House Officers to affirm summarily the decision of the two-judge majority below.

A. The Question Presented is Important and Substantial.

The federal Government and the House Officers do not deny that the question presented here is substantial. Nor could they. This Court has made clear that questions involving the circumstances in which American citizens may be deprived of the right to vote are fundamental under our Constitution. As the *amicus* brief for the League of Women Voters demonstrates, this Court has repeatedly accepted for plenary review those questions involving the dilution of a citizen's right to vote. Here, the question presented involves not just the dilution of that right, but its complete denial.

The principles of constitutional interpretation to which the Government adheres in its motion to affirm cannot be reconciled with its own history or this Court's precedents. In prior suits seeking to vindicate the people's right to representation in the House of Representatives, the federal Government has not hesitated to acknowledge the centrality of the right asserted:

> The right to vote is "one of the fundamental personal liberties protected by the Constitution."[1]

Nor has the federal Government, in earlier cases involving actions restricting the franchise, equated historical practice with what is constitutionally permissible:

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[1] Brief of the United States as Amicus Curiae, at 4, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *see Harper*, 383 U.S. at 670.

> "[W]hen this most fundamental right is involved—whatever 'the conception * * * of a bygone day'—it is surely axiomatic in our present democracy that no classification is reasonable which makes arbitrary distinctions with respect to the franchise."[2]

Finally, the federal Government has not previously shied away from perceived limitations in the constitutional text to give the right to vote its full effect:

> "The Constitution and its history demonstrate convincingly that the House of Representatives was intended to represent the people directly and that Congressional districting within each State, like the apportionment between the States, was to be on this same basis. Conceivably, this was merely the framer's intention rather than a binding requirement of the Constitution. However, the adoption of the Fourteenth Amendment—with its guarantee 'of the equal protection of the laws'—strongly indicates that Congressional districting must be based on population. . . . [T]he original framers made clear that equal protection, and indeed the basic fairness required by the due process clause, so required as to the federal House of Representatives."[3]

Sadly, in its motion to affirm summarily the decision of the two-judge majority below—a motion that does not even address the arguments raised by the dissenting judge—the

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[2] Brief of the United States, at 60, *Louisiana v. United States*, 380 U.S. 145 (1965); *see Louisiana*, 380 U.S. at 153.

[3] Brief of the United States at 35, *Wesberry v. Sanders*, 376 U.S. 1 (1964); *see Wesberry*, 376 U.S. at 7-18.

federal Government departs from these principles of interpretation and urges the "most literal reading" of Article I, § 2, without any acknowledgement of the resulting injustice to half a million Americans living in the District of Columbia.

B. The Question Presented is Not Appropriate for Summary Disposition.

The Government contends that the reference in Article I, § 2, to election by "the People of the several States" must be given its "most literal reading" as conferring a right to vote only on citizens who live in States, and not on those who live in the area that was part of the several States at the time the Constitution was adopted but then by cession became the nation's capital. U.S. Br. at 11. Any other interpretation, the Government argues, would "lead to insurmountable textual difficulties and conflict with both historical evidence and judicial precedent." *Id.* That is not so.[4]

First, the "uniform body of judicial precedent" that the Government claims in its support amounts, at best, to a few sentences of dicta. *See* App. 78a n.3, 119a-120a (Oberdorfer, J., dissenting). Other than the court below, no court, much less this one, has ever directly considered the question presented here: whether U.S. citizens living in the nation's capital and otherwise eligible to vote must be denied that right simply by virtue of their place of residence. No court has ever considered whether the Maryland citizens in that part of the State ceded to the federal Government could by cession constitutionally have been deprived of their right to representation, a right they had exercised for twelve years. Nor has any court ever considered the interaction between Article I, § 2, and the twentieth-century recognition of the

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[4] Because of the constraints of addressing these contentions summarily, we respectfully refer the Court to Judge Oberdorfer's dissent (App. 75a-145a) for a more complete elucidation.

depth of the equal protection and due process guarantees of the Fifth and Fourteenth Amendments for all Americans.

Additionally, the precedent is not nearly as uniform as the Government asserts. "Whether the District of Columbia constitutes a 'State' . . . within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved." *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). Where individual rights are concerned, the Court has not hesitated to hold that the people of the District should be treated as the people of a State, even with respect to those constitutional provisions that, on their face, appear to be limited to "States." *See National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949) (right to access federal court diversity jurisdiction); *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933) (right to have cases arising under the Constitution heard by an Article III court); *Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (right to full faith and credit of out-of-state judgments); *Callan v. Wilson*, 127 U.S. 540, 548-50 (1888) (right to trial by jury).

The Court's recognition that individuals in the nation's capital must enjoy the same constitutional rights as individuals who live in the fifty States is supported by the fact that the District was once part of the several States that formed and ratified the Constitution. App. 94a-103a (Oberdorfer, J., dissenting). As this Court explained in the *O'Donoghue* case:

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, ... We think it is not reasonable to assume that the cession stripped them of these rights[.] 289 U.S. at 540.

This history, and the history of the Constitution's ratification, soundly support appellants' claims that they are constitutionally entitled to representation in the U.S. House of Representatives. As Judge Oberdorfer points out, the Seat of Government clause in Article I, § 8, that the Government claims deprives District citizens of the right to congressional representation was discussed and adopted at the Constitutional Convention *without any recorded debate* as to its implications for the voting, representation or any other rights of the inhabitants of the territory that would ultimately be selected as the nation's capital. App. 85a, 112a.

The "historical evidence" that the Government points to in support of its argument that the Framers intended to disenfranchise District residents occurred not at the Philadelphia convention where the Constitution was drafted, but at one of the thirteen ratifying conventions that took place a year later. The Government cites a single comment made at the New York convention by Thomas Tredwell, who opposed the Constitution in its entirety, as well as a proposal by Alexander Hamilton to add an amendment to provide for "District representation" in the Congress once its population reached an unspecified number. U.S. Br. at 14-15. Judge Oberdorfer persuasively explains why neither of these isolated statements, at a single ratifying convention, can be considered evidence of an intent on the part of the framers to disenfranchise citizens residing in the nation's capital. App. 114a-118a.

Judge Oberdorfer's dissent also explains why the view of a handful of individual congressmen expressed at the time of the enactment of the Organic Act in 1801, in which Congress exercised jurisdiction over the District as the Seat of Government, is also not reliable "historical evidence" as to the original intent behind Article I, § 2. App. 118a-119a ("Had populous New York or Philadelphia been chosen as the permanent Seat of Government, however,—certainly a possibility in 1787—it seems unlikely that 1801 Congressmen would have seen the denial of voting representation for the

District's population as the Framers' manifest design.") (citation omitted).

Moreover, the voting history of District residents up until enactment of the Organic Act in 1801 is far from irrelevant, as the Government apparently believes. U.S. Br. at 17. Although it may not provide insight as to Article I's original meaning, it is indisputable evidence that the people of the nation's capital had, and exercised, a constitutional right to congressional representation for the twelve years from 1789 to 1801. Neither the cession instrument nor the Organic Act purported to take away that right and, as Judge Oberdorfer cogently argues, they could not constitutionally do so. *See* App. 97a-103a; *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736 (1964) (constitutional voting rights of minority not waivable by majority); *O'Donoghue, supra* (constitutional rights not lost at cession).

The "textual difficulties" in construing Article I, § 2, to recognize congressional representation for the U.S. citizens resident in the nation's capital are hardly "insurmountable," as the Government contends. For example, it observes that Article I, § 2, made an initial apportionment of seats in Congress among the original thirteen States based on their population at that time and that no seats were allocated to the capital district. U.S. Br. at 12-13. This is not surprising given that the site for the District had not yet been chosen when the Constitution was drafted, and no one knew what its population would be.

The Government is similarly troubled by the reference in Article I, § 2, to apportionment among "the several States *which may be included within this Union*," contending that the "Union does not include the District, which has never been admitted by Congress to the Union as a State." U.S. Br. at 12. This "textual difficulty" has already been resolved by the *O'Donoghue* case, when the Court held that "the District was made up of portions of two of the original states of the Union, and *was not taken out of the Union* by the cession." 289 U.S. at 540 (emphasis added).

The Government also notes that Article I, § 2, provides that the qualifications for voting in Congressional elections shall be the same as for voting for "the most numerous Branch of the State Legislature," and it asserts that the District has no such body. U.S. Br. at 11. However, if it were accepted that the District should be treated as a "State" for purposes of apportioning representatives to the "People of the several States" under Article I, there is no reason why the Council of the District of Columbia (or Congress itself) could not serve as the District's "State Legislature" within the meaning of that provision. Likewise, if the Court were to find that for this purpose District residents retained a residual citizenship in Maryland, that State's qualifications for voting in Congressional elections could be applied. Certainly, this "textual difficulty" is no more insurmountable than it is with respect to overseas voters who, despite the language of Article I, are permitted to vote in federal elections even though state law may not recognize them as having the qualifications to participate in state elections by virtue of their foreign residence. *See* App. 139a (Oberdorfer, J., dissenting).

The Government further argues that "the text and purposes of the Twenty-third Amendment confirm the correctness of the district court's analysis." U.S. Br. at 13. However, the amendment states only that the District shall be treated as "if it were a State" for purposes of Presidential elections. The amendment plainly does not say that the District shall not be treated as if it were a State for any other purpose; nor does it purport to change the Constitution's treatment of the District for any purpose other than Presidential elections.[5]

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[5] The Government's argument that what the twenty-third amendment did not expressly confer on District residents is implicitly denied is precisely the type of negative inference that this Court has refused to make in voting rights cases. *See, e.g.*, Harper, 383 U.S. at 666, 680 (striking down use of poll taxes in state (continued...)

Finally, the Government cannot simply brush off appellants' equal protection argument on the ground that the difference in treatment between residents of States and residents of the nation's capital is "drawn by the Constitution itself." U.S. Br. at 24 (citation omitted). As the federal Government itself has advocated in previous submissions to this Court, *see supra* note 3, the equal protection guarantee amends and informs the original Constitution, not the other way around. The government's current position that the equal protection clause is limited by what precedes it is inconsistent both with its own past position and this Court's precedents. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (fifth amendment due process guarantee must be interpreted to incorporate fourteenth amendment's promise of equal protection); *see also* App. 130a-144a (Oberforder, J., dissenting).

In sum, as even this cursory review illustrates, the textual, historical, and precedential arguments on both sides of the debate are nuanced and far from open-and-shut. The question whether United States citizens residing in the nation's capital can justly continue to be deprived of any voting representation in Congress is of the highest order and calls for plenary consideration by this Court.

C. Appellants Have Standing to Raise the Question.

As the three-judge district court unanimously determined, appellants have standing to pursue their claims. App. 8a-17a, 75a n. 1. In so holding, the court looked to this Court's decision in *Franklin v. Massachusetts*, 505 U.S. 788

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elections even though such a prohibition had been left out of the twenty-fourth amendment). Further, the ninth amendment forbids any inference that the Constitution's affirmative protection of certain rights implies that others are unprotected. U.S. Const. amend. IX.

(1992), in which a majority of the Court, in two opinions, necessarily concluded that the plaintiffs in that case had standing to pursue their apportionment claim against the Secretary of Commerce, the President, and the Clerk of the House. The court below held that appellants satisfied the redressability prong of the standing inquiry because "[h]ere, as in *Franklin*, neither the President nor the House officials have suggested that they would refuse to follow a decision of this court" directed to the Secretary of Commerce with respect to the apportionment of congressional districts. App. 14a.

Although the federal Government now agrees that, under *Franklin*, appellants have standing to press their case (U.S. Br. at 9 n.3), the House officers contend that the district court was obliged to determine separately, for each defendant, whether the court could grant injunctive relief that would redress appellants' injury. They rely for this proposition on the Court's decision in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-95 (1998), but all the Court held in that case was that a federal court may not exercise "hypothetical jurisdiction" by addressing the merits of a claim without first resolving jurisdictional objections. It did not overrule *Franklin* and require a plaintiff to establish standing separately against each and every defendant in apportionment challenges. Here, the district court acted fully consistent with *Citizens for a Better Environment* by first finding that appellants had standing under *Franklin* before proceeding to decide the merits of the case.

Even if the House Officers are correct that a separate standing determination was required, however, the requirements for standing clearly have been met. Appellants have an undeniable injury—the lack of voting representation in the House of Representatives—that is traceable in part to the actions of the House Officers, and can be redressed by them. The House Officers enforce the statutes, rules and determinations that prevent District citizens from being represented in the House of Representatives. Because the federal courts have the power to enjoin the House Officers to

abide by the Constitution in carrying out their duties in Congress, [6] this Court can redress those injuries by ordering the House officers to allow representatives of District citizens access to the House floor, to tally these representatives' votes, to include them on the Clerk's Roll, and to pay them appropriate salaries.

CONCLUSION

For the reasons given above and in appellants' Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

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[6] *See Powell v. McCormack*, 395 U.S. 486 (1969) (sustaining challenge to House officers' exclusion of Representative from Congress); *see also Boehner* v. *Anderson*, 30 F.3d 156 (D.C. Cir. 1994); *Michel* v. *Anderson*, 14 F.3d 623, 625-26 (D.C. Cir. 1994); *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1983).